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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 384.

IDA McCLUNG, PLAINTIFF IN ERROR,

vs.

WILLIAM A. PENNY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED JULY 24, 1902.

(16,812.)

(18,612.)

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a In the Supreme Court of the United States.

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } Citation.

The United States of America to William A. Penny, defendant in error, and Charles Ransom, his attorney of record:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the first Monday of December next in pursuance to a writ of error filed in the clerk's office of the supreme court of the Territory of Oklahoma, wherein Ida McClung is plaintiff in error, and you the said William A. Penny, are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error by the supreme court as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John H. Burford, chief justice of the supreme court of the Territory of Oklahoma, this 19th day of June A. D. 1902.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

I hereby acknowledge service of the foregoing citation this 19th day of June A. D. 1902.

C. W. RANSOM,
Attorney for Defendant in Error.

Filed Jul- 16 1902.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

b In the Supreme Court of the Territory of Oklahoma.

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } Return on Writ of Error.

In pursuance of the command of the writ of error within, I Benjamin F. Hegler, clerk of the supreme court of the Territory of Oklahoma, herewith transmit a true copy of the opinion and judgment of the said court, together with a true copy of all the records and proceedings filed and recorded in my office as clerk of said court, in the above-entitled cause, and I also transmit herewith the original assignment of errors, the writ of error, the citation and proof of service thereof, in the said cause lately pending in the supreme court of said Territory, all under my hand and seal of said court.

Witness my official signature and seal of the said supreme court,

at the city of Guthrie, in said Territory, this 7th day of July, in the year of our Lord, one thousand nine hundred and two.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of Oklahoma Territory.

1 In the Supreme Court of the Territory of Oklahoma.

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } Petition in Error.

Now comes the above-named plaintiff in error Ida McClung, and complains of the defendant in error, and alleges:

That heretofore, to wit, on the 26th day of October, A. D. 1900, the defendant in error recovered a judgment against the plaintiff in error in the district court of Kay county, Oklahoma Territory, for the possession of the southwest quarter (¼) of section thirty (30), in township twenty-six, (26), north of range one (1) east, I. M. in Kay county, Oklahoma Territory, and for costs of said action.

The plaintiff further alleges that there is manifest error in said judgment so rendered as aforesaid in said cause in this, to wit:

First. The court erred in assuming jurisdiction of the subject-matter of said action.

Second. The court erred in failing and refusing to dismiss said action on the motion of the plaintiff in error filed therein, and for the reason that neither the probate court nor the district court had jurisdiction to determine the rights of the parties.

Third. The court erred in allowing any testimony to be introduced in said cause over the objections of the plaintiff in error.

Fourth. The court erred in finding the issues in said cause in favor of the defendant in error.

Fifth. The court erred in rendering judgment in favor of the defendant in error for restitution of the premises and for costs of suit.

Sixth. The court erred in overruling the motion of the defendant in error for a new trial in said cause.

2 A case-made containing a full and complete record of the trial of said cause is hereto attached and made a part of this petition in error;

Plaintiff in error therefore prays that the judgment of the district court of Kay county be reversed and that said cause be remanded to said district court with an order that the said judgment be vacated and set aside and that said case be dismissed.

Plaintiff prays for such other and further relief as may be deemed just and equitable.

PANCOAST & BOWLES,
Attorney for Plaintiff in Error.

Filed, Apr. 15, 1901.

BENJ. F. HEGLER,
Clerk of Supreme Court,
By JESSIE PARDOE, *Deputy.*

In the District Court in and for the County of Kay, Territory of Oklahoma.

WILLIAM A. PENNY, Plaintiff,
vs.
IDA MCCLUNG, Defendant.

Case-made.

Be it remembered; that on the 14th day of May, A. D. 1900, the above-named plaintiff commenced his action against the above-named defendant in the probate court of Kay county, and on said day filed his complaint in said action, and caused a summons to be issued thereon; which said complaint is in the words and figures as follows, to wit:

Before Robert A. Neff, probate judge of Kay county, Territory of Oklahoma, and in the probate court of said county.

3 The said Neff being *ex officio* a justice of the peace.

WILLIAM A. PENNY, Plaintiff,
vs.
IDA MCCLUNG, Defendant.

Complaint in Forcible Entry and Detainer.

Come- now the plaintiff, William A. Penny, and for his bill of particulars and complaint herein, states, that he is the owner of and entitled to the immediate possession of the southwest quarter (¼) of section thirty (30) in township twenty-six (26) north of range one (1) east of the Indian meridian in Kay county, Oklahoma Territory; that the defendant, unlawfully, wrongfully, and forcibly detains and withholds possession of said quarter section of land, or a part thereof from this plaintiff, although plaintiff is, and at all times herein mentioned was, entitled to the immediate and peaceable possession thereof. And plaintiff further states that on the 9th day of May, A. D. 1900, he served upon the said defendant, personally a notice in writing to leave, vacate and quit said premises and every part thereof, within three days, or an action of forcible entry and detainer would be brought to compel the same; that the said defendant, has failed and refused to comply with said notice, but still, unlawfully and wrongfully, detains the possession of said premises from this plaintiff, who is entitled to the immediate possession thereof.

Wherefore, plaintiff prays judgment against the said defendant for the possession of each and every part of said quarter section, to wit, the southwest ¼ of section thirty (30) in township twenty-six (26) north of range one (1) E. I. M. in Kay county, Oklahoma for the costs of this action and all other proper relief.

J. F. KING,
Attorney for Plaintiff.

4 TERRITORY OF OKLAHOMA, } ss:
Kay County, }

William A. Penny, being first duly sworn, upon his oath states that he is the plaintiff in the above-entitled action, and has read the above and foregoing complaint and knows the contents thereof, and that the statements therein contained are true.

WILLIAM A. PENNY.

Subscribed in my presence and sworn to before me this 12th day of May, 1900.

ROBERT NEFF,
Probate Judge.

Endorsement: Filed May 14, 1900. Robert Neff, probate judge.

That thereafter, on the 26th day of May, A. D. 1900, the defendant filed her motion in said cause to consolidate with said cause the action of William A. Penny *vs.* Robert Winebrenner. Which said motion is in the words and figures as follows, to wit:

In the Probate Court of Kay County, Oklahoma.

WM. A. PENNY
vs.
ROBERT WINEBRENNER.

Now comes the above-named defendant and moves the court to consolidate this case with the case of Wm. A. Penny *vs.* Ida McClung, for the following reason:

That Ida McClung *vs* (is) the real party in interest and is claiming the right to the land invalued and the possession thereof, and that this defendant is only the tenant of said Ida McClung and has no other interest therein.

5 J. L. PANCOAST,
Att'y for Defendant.

Ida McClung hereby joins in this motion.

J. L. PANCOAST,
Att'y for Ida McClung.

Endorsement: Filed May 26, 1900. Robert Neff, probate judge.

That the order was made upon said motion, consolidating the two causes.

That thereafter, on the said 26th day of May, A. D. 1900, the said defendants, Ida McClung, and Robert Winebrenner, filed their affidavits and application for a change of venue of said cause; which said affidavit and application is in the words and figures as follows, to wit:

In the Probate Court of Kay County, Oklahoma.

WM. A. PENNY
vs.
IDA McCLUNG.

TERRITORY OF OKLAHOMA, *County of Kay,* } *ss:*

Ida McClung and Robert Winebrenner, being duly sworn state that they are the defendants in the above action. Defendants further state Judge Neff, the judge of this court, is a material witness on behalf of the defendant in this case. Defendant further states that she demands a jury for the trial of said cause and they verily believe they cannot have a fair and impartial trial of said cause in this, the township of Newkirk, on account of the bias and prejudice of the citizens thereof. Defendant therefore asks that the place of trial of this case be changed to some justice of another township.

6 Defendant hereby confesses judgment for all costs as provided in section eighty-three (83) of article seven (7) of justices procedure statute of 1893.

R. L. WINEBRENNER.
IDA McCLUNG.

Subscribed and sworn to before me this 26th day of May, 1900.
ROBERT NEFF,
Probate Judge.

Endorsement: Filed May 26th, 1900. Robert Neff, probate judge.

That upon the presentation of said application, the same was by the court overruled, to which ruling of the court the defendant then and there duly excepted.

Be it further remembered; that on the 26th day of May, A. D., 1900, the defendants filed their answer in said cause; which said answer, with the exhibits thereto attached, is in the words and figures as follows, to wit:

In the Probate Court of Kay County, Oklahoma Territory, Acting under the Jurisdiction of the Justice of Peace.

WILLIAM A. PENNY, Plaintiff,
vs.
IDA McCLUNG and ROBERT WINEBRENNER, Defendants.
} Answer and Bill of Particulars of Ida McClung, Defendant.

Now comes Ida McClung and Robert Winebrenner — for their answer to the bill of particulars of the plaintiff filed herein, says;

First. That they deny each and every statement, allegation and averment therein, contained, except as hereinafter specifically admitted.

Second. The defendants admit that they are in possession of a portion of the land described in the plaintiff's bill of particu-
7 lars, to wit, the southwest quarter of section 30, in twp. 26, north of range 1 east.

Third. This defendants further say-, that the title of the land is in dispute between plaintiff and this defendant, Ida McClung and that this defendant desires to make defense of her title and interest in said land, and that her defense is *bona fide*, and not made for the purpose of vexation or delay, but for the promotion of justice as will more fully appear from the facts in relation to her claim, which are as follows:

That this defendant is the widow and heir-at-law of Charles R. McClung, who was on the 16th day of September, 1893, a native-born citizen of the United States, over the age of 21 years, and was in all respects qualified to make entry upon public lands under the laws of the United States in the Cherokee Outlet;

That prior to the said 16th day of September, 1893, the said Charles R. McClung, desiring to enter upon the race for land in the Cherokee Outlet, procured a booth certificate at or near the booths south of the city of Arkansas City, in the State of Kansas, and at the hour of 12 o'clock noon, was upon the south line of the State of Kansas, ready to enter upon the race for a home in said Cherokee Outlet; that the said Charles R. McClung had never enjoyed a homestead right, and had never exhausted any of his rights under the laws of the United States, to take and hold a homestead in said Cherokee Outlet; that at the hour of 12 o'clock noon, central standard time, of the said 16th day of September, 1893, the said Charles R. McClung, with many thousands of other persons bend upon the same purpose started upon the race for a home in said Outlet, and the said Charles R. McClung ran with all possible speed to the land in question, and occupied the same for the purpose aforesaid; that he went upon the land and upon the 19th day of September, 1893, erected a tent thereon; that he immediately thereafter began improving said land by digging a well, building houses, making fence, and plowing and cultivating the same; that soon thereafter he established his residence upon the land and continued to reside thereon, with his family, until the
8 19th day of November, 1898, at which time he died, leaving this defendant as his widow and heir-at-law; that the said Charles R. McClung until the time of his death, improved and cultivated said land as required by the laws of the United States; that he built a good and permanent residence building upon said land; fenced about 155 acres thereof, placed in cultivation about 155 acres thereof, and at all times occupied and used said improvements in connection with his residence thereon; that the improvements on said land at the death of the said Charles R. McClung, and at the present time are of the total value of about $—; that ever since the death of Charles R. McClung, this defendant as his widow and heir-at-law, has continued to reside upon said land and continue to cultivate and improve the same, as required by the laws of the United States.

That on September 19th, 1893, one Perry Birdsell, made home-

stead entry for said tract of land, and on October 3rd, 1893, defendant's husband, Charles R. McClung, initiated a contest against said entry on the ground of priority of settlement, and on October 25th, 1893, the plaintiff in this case, William A. Penny, filed an affidavit of contest against said entry, alleging priority of settlement, and on December, 15th, 1893, applied to intervene in the case of McClung vs. Birdsell. Which application was granted and the cases were consolidated, and set for hearing on April 3rd, 1894.

That on March 28th, 1894, the said entry of Birdsell was concelled by relinquishment, and on the same day the husband of this defendant, Charles R. McCung, made homestead entry of said land; that various other proceedings were had with reference to said entry and contest, which more fully appear from the decisions of the Land Department; that various trials and hearings were had in the local office before the Commissioner of the General Land Office and the Secretary of the Interior, of the controversy between the plaintiff and this defendant as heir-at-law of the said Charles McClung, although at all times the said cause proceeded and was liti-
9 gated in the name of the said Charles McClung, and in each and all of said trials, and hearings it was admitted by the plaintiff and so found by the various officers of the Land Department, in the decisions rendered, that the said plaintiff had entered upon the country known as the Cherokee Outlet, subsequent to August 26, and prior to September, 16. 1893; at 12 o'clock noon, and at the hour of the opening of said Outlet, the said plaintiff was in the outer boundaries thereof, and was on the east bank of the Arkansas river, on that part of the Cherokee Outlet known as the Osage Indian reservation, and continued there during the forenoon of the 16th day of September, 1893, and up to and including the hour of 12 o'clock of said day, and immediately after the hour of noon of said date, the plaintiff went across the river, and proceeded to and went upon the land in controversy and staked the same; that in all of said contests and trials, it was found and adjudged that the rights of said William A. Penny, plaintiff herein, were superior and paramount to the rights of the said Charles R. McClung, and this defendant, which said decisions and judgments were based upon an erroneous conclusion of law in this:

That the said officers of the Land Department held and concluded that the said William Penny was disqualified to enter upon and hold said land as a homestead by reason of his having entered upon the said Cherokee Outlet, and upon said portion thereof, known as the Osage Indian reservation, within said Outlet, prior to September, 16, 1893, and subsequent to August 26, 1893, and by reason of his having been in close proximity to said land at the hour of opening and taking advantage of his position to reach said land in advance of the said Charles R. McClung. A copy of the decision of the local land office at Perry, O. T. is hereto attached, marked Exhibit "A," and made a part of this answer.

That from said decision in favor of the said Charles R. McClung, the said plaintiff appealed to the Commissioner of the General Land Office, that on August 24, 1895, the action of the local officers was

affirmed, and from that decision the plaintiff appealed to the
10 Department of the Interior, and by departmental decision of August 28, 1896, the decision of the local office was then affirmed, and the contest of the plaintiff herein was dismissed. A copy of which decisions *are* hereto attached, marked Exhibits "B" and "C" respectively.

That hereafter the plaintiff herein filed a motion for review of said departmental decision, and that on September 24th, 1897, the said contest cause was remanded to the local office for further hearing, upon the question of priority of settlement.

That hereafter a hearing was had, and the local office at Perry, O. T. found that Penny was the prior settler on the land, and recommended that the entry of the said Charles R. McClung be cancelled.

That thereafter the said Charles R. McClung appealed from said decision to the General Land Office and on August 16th, 1898, a decision was rendered affirming the decision of the local officers, and holding McClung's said entry for cancellation.

That thereafter McClung appealed from said decision to the Department of the Interior, where on March 3, 1899 a decision was rendered reversing the said decision of the General Land Office, and holding that McClung was the prior settler on said land and dismissing the plaintiff's contest;

That thereafter the plaintiff herein filed his motion for review of said last-mentioned decision and by departmental decision of May 1, 1899, said motion was denied and the said decision of March 3, 1899 was adhered to.

That thereafter a petition was filed by the plaintiff herein alternately praying that a rehearing of said cause of review thereof upon the record as already made be ordered under the supervisory authority of the Secretary.

That on September 29, 1899, it was ordered by this department that said petition be entertained, and on November 16th, 1899, Ida McClung, widow of Charles McClung, filed an answer to said petition, and the case was again considered before the department upon said petition, and answer, together with the original record;

11 That thereafter and on April 17th, 1900, the former decisions of the Department of the Interior were again reversed and the said plaintiff herein was held to be the prior settler upon said land, and the entry of the said Charles R. McClung, was held for cancellation. A true and exact copy of said decisions *are* hereto attached, marked Exhibits "D" and "E" respectively.

Defendant further says; That by reason of said misapplication of the law herein set out, and for no other reason, the said plaintiff was permitted to make homestead entry upon said land, and the homestead entry of the said Charles R. McClung, which inured to the benefit of this defendant by reason of the fact that she is his widow and heir-at-law, was unlawfully cancelled of record.

That if said mistake had not been made this defendant would have been awarded said land, and the homestead entry of the said Charles R. McClung left intact.

That this defendant, as well as the said Charles R. McClung in

his lifetime, has at all times resided upon and cultivated said land in good faith and as required by the laws of the United States for the purpose of acquiring a full and complete title thereto, and defendant is still residing upon and cultivating said land for the same purpose, and for no other purpose. That by reason of the interest which she has in said land, by virtue of her compliance with the laws of the United States, the title of said land is in dispute between the plaintiff and this defendant, and the plaintiff has no right to oust the defendant from the possession thereof, except by showing to the court that the facts set forth herein are not true and that there *are* no legitimate controversy between plaintiff and defendant, with reference to the title and ownership of said land.

That this defendant intends, as soon as patent issued to said plaintiff, to begin an action in a proper court, to have the same declared a title in trust for the benefit of this defendant, and to
12 have said erroneous and unlawful conclusions and judgments of the Land Department set aside; that if said plaintiff is permitted to oust the said defendant from the possession of said land, defendant will be powerless to prevent a relinquishment thereof, by which the plaintiff might place it beyond the power of defendant to cancel any title which might be granted by the Government of the United States.

That this defendant is informed and believes and therefore states the facts to be that it is the intention and purpose of the said plaintiff, that in the event that defendant is removed from said land, to relinquish the same to the Government of the United States, for the benefit of some person, a stranger to the disqualifications of plaintiff and thereby defeat the rights of this defendant to acquire title to said land and receive the benefits of her compliance with the laws of the United States, and to perfect the interest which she has gained in said land by reason thereof.

That said land with the improvements of the defendant thereon is reasonably worth and the relinquishment thereof could be sold for the sum of $5,000; that this defendant demands the right to remain in possession of said land by virtue of her vested interest therein, and as against the claims of said plaintiff under his void and unlawful homestead entry, in order to protect the limited title which defendant has acquired in said land, and to acquire a perfect legal title therein, under and by virtue of the laws of the United States.

The defendant further says, that she, together with Charles R. McClung, has fully complied with all the laws of the United States with reference to homesteads, and has resided upon and cultivated the said tract of land, continuously for a period of over five years and has performed all acts with reference to residence and cultivation required by law, and is now entitled to a patent therefor, from the United States.

That Robert Winebrenner is in possession as the tenant of Ida McClung.

Wherefore, defendant prays that plaintiff be not allowed to
13 maintain his action herein, and if said action be not dismissed that the same be certified by this court to the district court in order that the claims and rights of this defendant may be fully adjudicated.

J. L. PANCOAST,
Attorney for Defendant.

THE TERRITORY OF OKLAHOMA, } ss:
Kay County, }

Ida R. McClung, being first duly sworn on her oath states; that she is the defendant mentioned in the foregoing answer, and in the above-entitled action; that she has read the foregoing answer and bill of particulars, and knows the contents thereof, and that the facts set forth in the grounds following the general denial, are true.

IDA McCLUNG.

Subscribed and sworn to before me this 26th day of May, 1900.

ROBERT NEFF,
Probate Judge.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *April* 17, 1900.

Served May 17, 1900. Vol. 26, 658, W. V. D.

WILLIAM A. PENNY } Alternative Petition for Hearing or for
vs. Exercise of Supervisory Power.
CHARLES R. McCLUNG. }

The Commissioner of General Land Office.

SIR: On September 19, 1893, Perry Birdsell made homestead entry for the S. W. ¼ of sec. 30, T. 26, N. R. *L.* E., Perry, Oklahoma, land district.

14 On October 3, 1893, Charles R. McClung initiated contest against said entry on the ground of priority of settlement.

On October 25, 1893, William A. Penny filed an affidavit of contest against said entry, alleging priority of settlement and on December 16, 1893, applied to intervene in the case of McClung *v.* Birdzell.

The application was granted and the cases were consolidated and set for hearing April 3, 1894.

On March 28, 1894, said entry of Birdzell was cancelled on relinquishment, and on the same day McClung was allowed to make for the land.

The said relinquishment of Birdzell left only McClung and Penny contesting for the land.

After several continuances the case was heard on April 26, 1894. Penny testified that he entered the Territory on the day of the opening (September 16, 1893) from the Ponca Indian reservation, and upon the conclusion of his testimony counsel for McClung moved to

dismiss his (Penny's) contest on the ground that he, having made the race from the Ponca Indian reservation, was disqualified from making entry for the land. Said motion was sustained by the register and receiver, who thereupon recommended that said contest be dismissed. Penny appealed to your office, where, on August 24, 1895, the action of the local officers was affirmed, and from that decision Penny appealed to this department, and by departmental decision of August 28, 1896, following the holding in the case of Cagle *v.* Mendenhall (20 L. D., 446) said decision of your office was affirmed and Penny's contest was dismissed.

Penny filed a motion for review of said departmental decision, and while said motion was pending, this department, December 23, 1896, in the case of Brady *v.* William (23 L. D. 533), overruled the case of Cagle *v.* Mendenhall, and held that the facts having made the race from an Indian reservation did not disqualify one from making an entry for said lands.

15 On September 24, 1897, the case of Penny *vs.* McClung was remanded to the local office for further hearing on the question of priority of settlement.

The further hearing was had, and thereupon the local officers found that Penny was the prior settler on the land in controversy, and recommended that McClung's entry be cancelled.

McClung appealed to your office, where, on August 16th, 1898, a decision was rendered affirming the action of the local officers and holding McClung's said entry for cancellation. McClung appealed from said decision to this department, where, on March 3, 1899, a decision was rendered reversing said decision of your office, holding that McClung was the prior settler on said tract and dismissing Penny's contest.

Penny filed his motion for review of said last-named decision, and by departmental decision of May 1, 1899, said motion was denied and said decision of March 3, 1899, was adhered to.

An informal and later a formal petition was filed by Penny alternatively praying that a rehearing of said cause or a review thereof upon the record as already made be ordered under the supervisory authority of the Secretary of the Interior.

On September 29, 1899, it was ordered by this department that said petition be entertained, provided, copies of the same and accompanying papers and of said departmental order should be served upon the opposite party and said petition returned to your office with evidence of such service within thirty days from receipt of said order. Said petition, etc., was duly returned with evidence of service of copies of same on F. L. Harvey, attorney for McClung on October 16, 1899.

On November 16, 1899, counsel for McClung filed an answer to said petition, and the case is now before the department for consideration upon said petition and answer, together with the original record.

It is alleged in said petition that:

1. An examination of these two decisions (decisions of March 3, 1899, and May 1, 1899) in connection with the record in the case

shows such manifest errors in said decision as call for prompt revision.

16 2. It is insisted that said departmental decision of March 3, 1899, admitted that Penny was the prior settler, and yet in the face of said decision and admission, that the departmental decision of May 1, 1899, states that, 'The department has found that Penny was not the prior settler; that McClung was the prior settler,' and this alleged to be contrary to the facts appearing in the record.

3. It is alleged that in said decision of March 3, 1899, it was erroneously stated that 'Penny's entire expenditure upon the land up to the date of hearing would appear to have been $25 to $40' and that this error was practically admitted in said decision of May 1, 1899 and the effect sought to be avoided by the statement 'that the added improvements of Penny, running into hundreds of dollars, were hastily put upon the land after the department had ordered rehearing' and it is suggested that these discrepancies in the statement of facts indicates that said decisions have not correctly comprehended the facts.

4. It is pointed out in said petition that said decisions expressly hold that Penny did not on September 16, mark out a place where he afterwards started his dugout, and it is insisted that the proof shows that Penny, on September 16, did some excavating at a place he *then* intended to build his dugout.

5. It is also insisted in said petition that the statement contained in said departmental decisions to the effect that McClung erected a tent on the land in controversy on September 19, 1899, is not sustained by the proof.

6. It is further insisted that the department erred in holding that the restraining order procured by McClung was not a sufficient excuse for Penny's failure to comply with the requirements of the law in the matter of improvement and cultivation of the land and residence on it.

For the defendant it is insisted that said petition is only a reiteration of the allegations of error made in the former motion for review, and that the matters therein presented have been fully considered and passed upon by the department and should not now be reopened.

The question of priority of settlement was considered in said decision of March 3, 1899, and that the erection of a tent on the land by McClung on September 19, 1893, was referred to as his first act of settlement, and the proof seems to sustain said decision as to the erection of said tent; but it was not in terms admitted in said decision that Penny was the prior settler on the land, but it was held substantially that while he was the first to reach and stake the land his acts of settlement thereon, prior to McClung's settlement, were not such as to give lawful notice of his claim, and that therefore he was not in legal effect the prior settler. The acts of both parties were considered with reference to the establishment and maintenance of residence, improvement and cultivation of the land, etc.,

17 and in that connection consideration was given to the restraining order relied upon by Penny to excuse him from

doing more than he had done in the matter of residence on, and improvement and cultivation of, the land.

Notwithstanding the matters referred to in said petition seem to have been considered in said former decisions, still if it appears that the findings of the department in said decisions are erroneous as to material matters of inquiry, and that injustice will result from said decisions, this department will in the exercise of the supervisory authority conferred upon it by law, recall said decisions, correct said findings and render such decision as may appear to be just and proper upon a reconsideration of all the evidence.

The relinquishment of Birdzell left the contest between Penny and McClung who stood upon equal footing as contestants, and the fact that McClung was erroneously allowed by the local officers to make entry for the land while Penny was contesting on the ground of prior settlement, gave McClung no advantage in the contest, and hence, in weighing the evidence McClung's entry cannot be held to require a preponderance of proof on Penny's side, any more than if the entry had not been made.

The proof shows that Penny arrived on the land a few minutes before one o'clock, p. m. September 16, 1893, and at once put up a stake upon which he tied a red handkerchief; the stake was about 75 or 100 yards from the south line of the tract. He then proceeded to dig a hole 18 inches in diameter and eighteen inches high. This hole was commenced for a well. On the same afternoon he dug and threw out a portion of the river bank at a point where he then intended to build a dugout. It seems the bank of the river at that place is very precipitous and at night when Penny and others in the neighborhood went to water their horses in the river, they found that the digging that Penny had done made that particular place the most convenient one to go down the bank to water, and he then determined to use it for that purpose. He slept on the claim the night of September 16, and the next day went to the land office at Perry to get a number preparatory to filing on the land. He returned to the land on the afternoon of the 19th about three or
18 four o'clock, and, on the morning of the 20th he started back to Perry to see about his filing. He left the claim between seven and eight o'clock, but before leaving he marked off a new place where he wanted his dugout made, and engaged two men to dig in it while he was gone. In marking the place he used a spade. He did not dig much but marked the ground to show the men where they should dig the dugout, and they commenced excavating about ten o'clock on the morning of September 20th. On that day they dug the west end of the dugout down about a foot or a foot and a half deep, clear across dug the doorway open and dug around where Penny had marked off for the building. They threw the dirt up on one side and it made a mound that a witness says, was "plain to be seen anywhere."

It appears that Penny had two wagons on the land, in one of which he rode when he made the race on the day of opening, and in which he and Brady rode to Perry on September 20, and the other one was brought in for him to convey provisions, cooking

utensils, tools, etc. The proof does not show whether or not his last-named wagon was left on the land when Penny went to Perry on the 20th, but it is not shown to have been moved off the land.

Penny returned from Perry on Friday, September 22, a little before dark, and Brady, who was with him, testifies that at that time he saw the dirt that had been thrown out where the men had been digging on Penny's dugout, and that it was within 100 yards of the road and was in plain view.

Brady testified that on the same night (September 22,) as he and Penny were returning from the land office he heard a conversation between Penny and McClung in which McClung told Penny that if he (Penny) could hold, coming from the reservation, he wouldn't give him any trouble.

On September 28, Penny had some logs cut, hauled and put on his dugout and he continued to work on it at intervals till it was finished, which was some time in October, and on November 17th, Penny moved his family into it and he claims to have re-
19 sided there ever since. He testifies that when he moved his family to the dugout he found that McClung had fenced nearly all the land, leaving a roadway outside the fence along the river bank, in which roadway Penny's house stands. This roadway is shown to be about 30 feet wide. Penny says that while he was unloading his things at this dugout McClung passed by and told him that if he (Penny) went inside his fence he would spend a thousand dollars on him, and that he (Penny) understood that to be a threat that McClung would sue him, and he swears that he was a poor man and not able to bear the expense of a lawsuit, while he understood that McClung was a man of considerable means, and would put him to all the trouble and expense he could.

Finding himself thus fenced out and forbidden to enter the land, Penny went to Newkirk for the purpose of applying to the district court for an order giving him possession of a portion of the land. The district court not being in session, he made his application to the probate judge, by whom an order was granted giving Penny possession of one-half of the land, pending the contest, and under that order he, at once, entered the enclosure and resumed work on the well he had commenced on the day of the opening. At that time there was no plowing done on the land. McClung served a notice on Penny to appear before the judge of the district court at chambers, at Round Pound, to show cause why said restraining order made by the probate judge should not be dissolved, and a day or two later he (McClung) gave notice that he would apply to said district court for an order restraining him (Penny) from interfering with the land. Penny seems to have prepared for the trial elsewhere. He says, "I went to Newkirk, took the affidavit of Mr. Brady and myself and presented them there to Round Pound." What other evidence, if any, he offered, or what was offered by McClung does not appear, but the result was that the injunction granted by the probate judge was dissolved and a temporary injunction was granted to McClung by the district judge restraining

Penny from interfering with any of the land embraced within
20 McClung's enclosures. This last-named injunction seems to have been granted upon a cross-petition of McClung in the case of Penny *vs.* McClung. The case came on for final hearing before the district court of Kay county, Oklahoma, on September 14, 1894. McClung appeared in person and by attorney, but Penny did not appear either in person or by attorney, and the temporary injunction granted in favor of McClung by the district judge at chambers, was ordered to remain in force till the rights of the parties to the land should be determined by this department.

Penny now claims that it was in consequence of this injunction that he did no more than he did in the way of cultivation, improvement and residence on the land. But it is insisted for McClung that Penny ought not to be allowed to plead that excuse now, because he made default at the final hearing, and allowed the temporary injunction to be made final without objection on his part, and it is claimed that if Penny had appeared at said final hearing and asked for an order allowing him possession of half of the land, such an order would have been granted by the court.

It is difficult to determine what might have been the action of the court if Penny had appeared and resisted McClung's application and asked for a division of the land. Some testimony is offered to show what was the customary action of the court with reference to dividing lands between litigants pending contests but no fixed rule has been shown, and it is impossible to determine what effect, if any, Penny's presence at the court, at the time the order was entered, might have had to prevent the order. What weight may have been given by the court to the claim that McClung had an entry of record for the land, and was therefore *prima facie* entitled to the possession cannot be shown, but that fact should not, in justice to Penny, have weighed in McClung's favor, because, as has been already stated, said entry should not have been allowed pending the contest. It is insisted for Penny that the prevailing opinion in that section at
that time was that those who, like himself, had made the race
21 from the Ponca reservation were not entitled to hold lands in the Territory, and that the court would have been disinclined to make an order allowing him possession of any of the land, even if he had appeared and asked for such an order. Proof has been offered to show that it was the custom of the court in such cases to allow a litigant to retain possession of all the land he had enclosed by fencing, while on the other hand it was customary to divide between the parties the "raw" or unplowed land, but not to take land that had been plowed from the possession of one party and give it to another.

The proof in this case shows at the time said final restraining order was entered, McClung had almost the entire tract fenced and about 100 acres of it plowed and Penny says, in explanation of his failure to appear at the final hearing, that he had offered all his proof at the preliminary hearing at chambers and had nothing further to offer; that at the time of preliminary hearing none of the land was plowed, while at the final hearing 100 acres were plowed, and there-

fore he had no reason to suppose that by merely appearing in court with no further evidence, the court would take from McClung, an entryman, the plowed land which had been awarded to him before it was plowed and give it to him, (Penny) who was a Ponca runner and had no entry of record, and being scarce of means to defray the expenses of further litigation he did not think it advisable or necessary that he should attend at said hearing. This explanation seems to be sufficient, if indeed, any were necessary. The injunction in any event was to be operative only until the rights of the parties should be determined by this department. Being enjoined from interfering with the land enclosed by McClung, Penny could not, without incurring the penalty for a contempt of the process of the court, enter upon, improve or cultivate that land, and he cannot be deprived of the benefit of this excuse unless it be affirmatively shown by McClung that the issuance of the injunction was the result of Penny's negligence or acquiescence. That he did not acquiesce in the granting of the temporary or preliminary injunction is admitted, and it appears that he contested the granting of it the best he could. The situation had not changed in his favor between that time and the final hearing, but rather against him; so as he looked at it he could hope for no action in his favor by the court until his right was recognized by the Land Department.

Penny's family remained on the land in controversy from November 17, 1893, till August 17, 1894. During that time Penny was working for S. W. Coffelt, who resides in the same township. Coffelt could employ him no longer and being unable to rent land in that vicinity, he rented a farm in Kansas. Previous to the opening of the land in controversy to settlement, Penny was engaged in farming on rented land in Kansas, and after the issuance of the injunction, he says, he made various efforts to rent lands in the vicinity of his residence, but was unable to do so. It is shown by McClung that some Indian allotments in that vicinity were rented after that time, but Penny says that he was unable to comply with the terms upon which they were rented in that a bond was required of the renter, which, being a stranger in the community, he could not give, and so he went into the neighborhood in which he had formerly lived in Kansas and rented a farm several miles from the one he had formerly lived —. From August 17, 1894, till about fifteen months before the time of the hearing, the family frequently left the claim in controversy and went to the newly rented farm in Kansas to assist him in his farming operations. On these occasions they would take with them a portion of their household goods, such as bedding, etc., but always left a portion on the claim, and they always left with the intention of returning to the claim when their work on the farm was finished and they never remained away from the claim as much as six months at any time.

Coffelt, who testifies that he gave particular attention to the dates on which they left the claim and on which they returned, says they first left August 17, 1894, and returned February 13, 1895; left again March 17, 1895 and returned in the following June, left again shortly afterwards and remained away sixteen days, and then re-

turned and stayed on the claim till May, 1896, the children going to the public school that year. From May 1896, they were absent till June 21, 1896, and his testimony is not very clear as to their whereabouts from that time till October 17, 1896, when they again returned and stayed till July 1, 1897, when
23 they left and remained away about sixty days, returning September 1, 1897, since which time they have continued to reside on the land. Before moving to the claim in controversy in 1893, Penny gave up the land he had rented in Kansas, sold his growing crop of wheat and made other preparations for permanently changing his home. When he moved to the claim he took with him his live stock, consisting of several head of horses and cattle and on reaching the claim and finding it fenced up by McClung, and having no place to keep his stock, he got some of the neighbors to keep the stock for him till he rented the farm in Kansas, and then, having pasture on that place, he moved a portion of the stock to the rented farm. He succeeded in renting land in the vicinity of his claim in the year 1897, and then moved his stock from Kansas again and McClung admits that since September 2, 1897, Penny has continued to reside on the land.

Considering the fact that by means of said injunction Penny was deprived of the possession of any of the land on which he could make a support, these temporary absences appear to have been necessary, and therefore cannot be held to have been an abandonment of his claim or to have broken the continuity of his residence thereon, which must be held to have been established in reasonable time. This leaves only one question to be determined, viz: whether or not Penny's acts of s-ttlement prior to McClung's settlement, were such as to manifest his intention to claim the land and sufficient to give reasonable notice thereof.

McClung relies upon the erection of a stake and tent on the land on the afternoon of September 19th, as his initiatory act of settlement. This tent was erected late in the afternoon of the 19th. Park Bridges, a witness for McClung, says that he assisted in putting up the tent, and that it was erected "in the evening towards dark" "about sundown." The wind blew the tent down soon after it was erected. McClung says it was blown down about sundown. Said departmental decision of March 3, 1899, states that "about four o'clock the same day (September 19) he put up a tent in which he put some bed clothing, cooking utensils and other articles;
24 that evening the tent blew down and McClung went to his cousin's and stayed all night; but on Wednesday morning, September, 20th, about eight o'clock he again put up the tent." Whether the tent was erected about sundown or toward dark, as testified by Bridges, or before that time the evidence does not show that McClung put anything in it that day; he (McClung) after stating that he erected the tent on the afternoon of the 19th, makes this statement about the matter:

We erected the tent and the ground was very hard, didn't get the tent up good and solid, I thought it would stand; we went on back to Kyle's tent where our cooking utensils and things were at that

time * * * I was going to return there and sleep in the tent that night, bring down my part of the things we brought in, bed, clothing, and cooking utensils and such things, and about sundown this tent blowed down * * * and told the boys didn't think it would make any difference, stay there with Kyle that night and go down the next morning and put the tent up.

It is stated in said departmental decision of March 3, 1899, that the tent was re-erected about 8 o'clock the next morning. McClung so testified and the preponderance of the evidence seems to sustain that statement, but it — controverted by Penny, and McClung's witness, Bridge, who was the only one who assisted in re-electing it, testified in reference to the time as follows:

Q. How long did that tent stand there where he put it up on September 19, 1893? A. It blew down that night we put it up, and laid there until evening of the 20th.

Q. Was the tent standing there on this tract throughout Wednesday (Sept.?) April 20th, 1893? A. It laid there until evening and then we put it up again.

Said departmental decision erroneously states that this witness "states that he assisted McClung in putting up his tent Tuesday afternoon and again Wednesday morning." Said decision after citing the testimony as to the re-erection of the tent on Wednesday morning, the 20th of September, states that "there is abundance of testimony that he had a tent on the land at eight o'clock, on September 20th, and there is no witness who places the first stroke of work done toward building Penny's dugout earlier than ten o'clock on that day." This statement is challenged by Penny, who refers to the evidence of digging done by him on the bank of the river on the day of the opening *at the place where he then intended to build his dugout.* This work was doubtless intended by Penny, at that time, as the beginning of his dugout, but finding that to be a convenient place to go down the bank of the river to water the stock, he changed his mind with reference to the location of his dugout, and on the 20th began it in another place where it was subsequently finished, and to show that said statement is not correct as to the time when the first work was done on Penny's present dugout, he cites the testimony of the witness William McBride, who testifies that Penny left the claim to go to Perry on the morning of the 20th between seven and eight o'clock, and that before leaving he took Webb and showed him where to dig the dugout and marked it out with a spade, "cut kind of a ring around the size he wanted * * * didn't do very much; just marked it good so it could be seen." The witness, A. Webb, testifies that he was present on Wednesday morning and saw Penny mark off with a spade, where he wanted his dugout made. The proof shows that Penny's dugout was made in the place marked out by him that morning. Just what time he marked off the place does not appear, but it was some time before he left for Perry, which is shown to have been before eight o'clock. He had engaged McBride and Coffelt to work on the dugout in his absence, and they begin digging about ten o'clock. So it appears that before McClung erected said tent and stake on Septem-

ber 19, Penny had put up a stake and flag; done some excavating on the river bank for a dugout; slept on the land; had his teams and two wagons there; had gone to the land office to make preparations to file on the land; had returned and was at that moment actually present on the land claiming it and before McClung re-erected the tent after it blew down (even his witness, Bridges, is mistaken when he says it was not re-erected till late in the evening of the 20th) Penny had commenced his dugout in the place where he subsequently finished it and where he still resides.

McClung states that at the time when he erected the tent and stake he had no knowledge that Penny had done any work on the land or was claiming it, but if the stake and the tent which McClung put up and which immediately blew down, were sufficient to give notice of his claim, certainly Penny's acts above
26 referred to, were sufficient notice of his claim and having been done within four days after the opening must be held to have been performed within reasonable time, and besides Penny swears and proves by three other witnesses that after McClung commenced to build his house he told him that if he (Penny) was not disqualified to make entry for the land by reason of having run from the Indian reservation, he would give him no trouble. McClung admits seeing Penny at the time and place mentioned by Penny and these witnesses and also admits having a conversation with him in which he says Penny told him he came from the east line but he denies having made the statement attributed to him by Penny and three other witnesses.

In regard to the alleged conversation Penny testifies as follows: I came from Perry, there was a house going up on this claim, two men working on it. I says, 'Who is building this house?' No; I says, 'Is there a party by the name of Birdzell here?' And that gentleman, there, Mr. McClung, come out and says, 'There is not,' and I said, 'Who is building this house?' He says, 'I am.' I says, 'Do you know that this is my claim?' He says, 'I knowed somebody was claiming it.' Wanted to know then if I had run from the east side; I said I did; he says, 'If you had a right to run from there, I will make you no trouble.'

This testimony was given in relation to a conversation alleged to have taken place on September 22, 1893, and Penny testified further as follows:

Q. State, Mr. Penny, what conversation took place between you and Mr. McClung on the 28th or 29th of September, if any. A. On the 28th or 29th of September Mr. Coffelt and Mr. Frantz, Charley Brady had been working on my house; as we went up where he was, and went out to look at a drill, it was a new kind of a drill, one I had never seen, and was looking at it, and the conversation came up about some man writing a letter in the paper that the east liners had a right to run; I showed it to him; he said that was only one man's opinion; that was the opinion of only one man, and he didn't care for that, and if I had a right to run from there, I was there before he was and that he would give me no trouble.

In the conversation first referred to, the witness states that Mc-

Clung admitted that he knew there was some one claiming the land and admitted that if Penny was qualified to enter it, his (Penny's) claim was superior to his and in the conversation the 28th or 29th of September he expressly admitted that Penny was there before he was.

These admissions by McClung shows that he knew, either
27 by seeing Penny's improvements and evidences of settlement on the land, or by some other means, that Penny had claimed the land before he did, and if he, with the knowledge of that fact, entered upon the land, set up a stake and a tent and undertook to hold the land against the known prior settler, he cannot be heard to say that Penny's acts of settlement were not sufficient to give notice of his claim. The placing of improvements on a claim only amounts to constructive notice, while McClung is shown by his own admissions to have had *actual* notice.

The result is that said departmental decisions of March 3, and May 1, 1899, are hereby recalled and this decision is substituted in lieu of said decision of March 3, 1899. Your said decision of August 16, 1898, affirming the decision of the local officers, is affirmed, and said entry of McClung will be canceled provided Penny shall complete his entry within a time to be fixed by your office.

The papers in the case are herewith returned to your office.

Very respectfully, E. A. HITCHCOCK, *Secretary.*

E. N. W.

Ex. "B."

"H."
J. L. M.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April* 30, 1900.

Doc. 6, case 8427.

WILLIAM A. PENNY
v.
C. R. McCLUNG.

Register and receiver, Perry, Oklahoma.

SIRS: In reference to the above-entitled case, involving the S. W. ¼ section 30, township 26, range 1, covered by H. E. No. 5963, made by McClung February 24, 1894, you will find herewith a copy of departmental decision of April 17, 1900, recalling departmental decisions of March 3, and May 1, 1899, which reversed the decision of this office dated August 16, 1898, in favor of Penny.

The department now directs that in event Penny completes
28 entry of the land at a time to be fixed by this office, McClung's entry be canceled.

You will notify the parties in interest of said decision and Penny that he will be allowed thirty days to enter the land, and in event of his so doing, you will cancel the entry of McClung and report the same to this office in a separate letter.

Penny's booth certificate is herewith returned, to be placed with his entry should he make one.

The case is hereby closed.

Very respectfully,

W. A. RICHARDS,
Assistant Commissioner.

UNITED STATES LAND OFFICE,
PERRY, OKLA. TER., *October 3rd*, 1900.

I, Alfred H. Boles, register of the United States land office at Perry, Oklahoma Territory, do hereby certify that the above and foregoing decision is a true and exact copy of the original decision in the case of Penny *vs.* McClung now on file in my office.

ALFRED H. BOLES, *Register.*

Being the Secretary's decision dated April 17th, 1900, and Commissioner's letter dated April 30, 1900.

Endorsements on answer: Filed May 26th, 1900—Robert Neff, probate judge.

Be it further remembered: that thereafter, on the 26th day of May, A. D. 1900, the plaintiff filed his reply to the defendants' answer in said cause; which is in the words and figures as follows, to wit:

In the Probate Court of Kay County, Oklahoma Territory.

WILLIAM A. PENNY, Plaintiff,
vs.
IDA MCCLUNG and ROBERT WINEBRENNER, Defendants.

29 *Reply.*

Comes now the above-named plaintiff, William A. Penny, and for his reply to the third paragraph of defendants' answer denies each and every allegation therein contained except as hereinafter expressly admitted. Plaintiff admits that the defendants are in possession of (155) one hundred and fifty-five acres of the tract of land set out in plaintiff's bill of particulars, and were so in possession at the time of the commencement of this action.

Plaintiff admits that he is the homestead entryman of said land.

Plaintiff admits that there is no contest pending between the said defendants or either before the Land Department of the United States and this plaintiff involving said land or any part thereof.

Plaintiff admits that defendant, Winebrenner, is the tenant of his codefendant, McClung of the said tract of land and has no other interest in said land or any part thereof.

Wherefore plaintiff prays judgment against said defendant for possession of said premises and costs.

J. H. KING AND
C. W. RANEY,
Att'ys for Plaintiff.

Endorsement: Filed May 26, 1900. Robert Neff, probate judge.

Thereafter, on the 26th day of May, A. D. 1900, a trial was had in said cause before the court and jury, and a verdict rendered in favor of the plaintiff, and judgment was thereupon rendered in favor of the plaintiff on the verdict for the possession of the property and for costs of suit.

That thereafter, on the 4th day of June, A. D. 1900, the defendant, Ida McClung, filed her appeal bond in due form, which was on said day approved by the court, and duly perfected her appeal in said cause to the district court of Kay county,—

30 A transcript of said proceedings and judgment before the said probate court is in the words and figures as follows, to wit:

Probate Judge's Transcript.

TERRITORY OF OKLAHOMA, } ss:
Kay County, }

Before Robert A. Neff, probate judge of Kay county, O. T.

WILLIAM A. PENNY, Plaintiff, }
vs.
IDA MCCLUNG, Defendant. }

Names of attorneys, J. F. King, J. L. Pancoast.

The plaintiff files complaint 5–14–1900. Summons issued served 5–14–1900. Returned 5–17–1900. Motion and affidavit for continuance (by def't) 5–18–1900. Motion to consolidate, answer filed, motion to strike out, reply and venire issued and served, returned 5–26–1900. Officer's return of services, "Personal service" day set for trial 5–18, 26–1900.

Plaintiff deposits $10,00 in lieu of cost bond. May 14th, 1900.

May 18th, 1900.—Defendant files motion and affidavit for continuance of eight days Case continued to May 26th, 1900, at 9 a. m.

May 26th, 1900.—Case called at 9 a. m. all parties present in person and by attorneys. The defendant in this case together with Robert Winebrenner file motion that this action and the action of Wm. A. Penny *vs.* Robert Winebrenner, be joined as one. There being no opposition to the motion. The said motion is sustained, and the two cases are hereby joined. Defendant files motion for change of venue, which motion the court overrules for the reason that

31 the said motion is not in conformity with the statutory requirements. To which ruling defendants excepts.

Plaintiff objects to defendants being granted leave to file answer at this time, and excepts to the order of the court permitting said answer to be filed. Application in the prayer of the answer court overruled, to which ruling defendants excepts. Defendants demand trial by jury and deposits $3.00 therefor. List prepared, jury struck, and venire issued. At the noon hour the court orders a recess until one o'clock p. m. At one o'clock p. m. court resumes. All parties present. The jury is examined, accepted and sworn to try the case.

The plaintiff introduces as witnesses, Wm. A. Penny, and rests. Defendants introduce as witnesses Ida McClung, R. L. Winebrenner, J. L. Pancoast, and rests. After argument by counsel for both the plaintiff and defendants the jury retire in charge of a duly sworn bailiff, and after due deliberation, returns into court the following verdict:

"In the Probate Court of Kay County, Territory of Oklahoma, Sitting at Newkirk, County of Kay, said Territory.

WILLIAM A. PENNY
vs.
IDA MCCLUNG and R. L. WINEBRENNER.

We, the jury, empannelled and sworn to try the issues in the above-entitled cause, do, upon our oaths, find the defendants guilty.

P. M. SMITH, *Foreman.*"

Wherefore, it is the order, judgment and decree that the defendants are guilty as charged, and that plaintiff is entitled to possession of the premises described in his complaint, and that he also have judgment for the costs of this action taxed at $18.65 and
32 $5.75 sheriff's cost against R. L. Winebrenner, a total taxed at $23.15.

ROBERT A. NEFF, *Judge.*

Appeal bond filed and approved, June 4th, 1900.

Probate judge's fees.		Defendant's witnesses.	Names of jurors and fees.
Transcript	$1.25	Ida McClung	T. Gabriel.....P'd 50c.
Transmitting papers	.25	R. L. Winebrenner	Byron Williams.....P'd 50c.
Certificate	.25	J. L. Pancaost	Thomas Smith.....P'd 50c.
Probate judge's fee	7.50		J. G. Long.....P'd 50c.
			F. M. Morrison.....P'd 50c.
Total	$9.25		P. W. Smith.....P'd 50c.

Sheriff's fees.		Plaintiff's witnesses.
Bringing into court	$8.15.	Wm. A. Penny.
No. of commitments	5.75.	
Total	$13.90.	

Receipt for fees.
$3.00 for jury fees.

TERRITORY OF OKLAHOMA, } ss:
Kay County, }

I, Robert A. Neff, the undersigned probate judge of Kay county, Territory of Oklahoma hereby certify that the above is a full and true copy from my Probate Judge's Docket, No. 1, page 189, of the proceedings had by and before me at my office in said county in the above action.

Witness my hand at Newkirk in said county this 18th day of August, A. D. 1900.

ROBERT A. NEFF,
Probate Judge.

Endorsement: Transcript. Robert A. Neff, probate judge. William A. Penny, plaintiff *vs.* Ida McClung, defendant.

33 Be it further remembered: That thereafter, at the September 1900 term, said cause coming on regularly to be heard before the district court, the said defendant, Ida McClung, filed her motion to dismiss said cause; which said motion is in the words and figures as follows, to wit:

In the District Court of Kay County, Territory of Oklahoma.

WILLIAM A. PENNY, Plaintiff,
vs.
IDA MCCLUNG, Defendant. } Motion to Dismiss.

Now comes the defendant and moves the court to dismiss the action of plaintiff herein for the reason that it appears from the pleadings and records of this cause that the title to the premises described in plaintiff's bill of particulars is in dispute and that a determination of the question of title is necessary in order to ascertain who is to prevail in this action, and that neither the lower court nor this court have jurisdiction to determine the rights of the parties in an action of unlawful detainer.

J. L. PANCOAST AND
S. H. HARRIS,
Attorneys for Defendant.

Endorsement: Filed Sept. 26, 1900. Jay E. Pickard, clerk. By E. A. Burke, deputy.

That said motion coming on to be heard before the court, and being duly considered and the court being advised in the premises, said motion was overruled. To which ruling the defendant, Ida McClung, then and there duly excepted.

34 Thereupon said cause was called regularly for trial, and a jury being waived the cause was tried to the court. A transcript of the evidence and proceedings of the trial of said cause is as follows, to wit:

Transcript of Testimony.

In the District Court of Kay County, Oklahoma Territory.

WILLIAM A. PENNY, Plaintiff,
vs.
IDA MCCLUNG, Defendant. } Case No. 1622.

Appearances: Ransom & Bailey, and J. F. King, for plaintiff. J. L. Pancoast and S. H. Harris, for defendant.

Be it remembered, that on this 26th day of October, A. D. 1900, a judicial day of the regular September term 1900, of the district court of Kay county, Oklahoma Territory, this cause comes on to be heard before his honor, Bayard T. Hainer, a jury having been previously

waived in open court by both parties, the following officers of the court also being present, Jay E. Pickard, clerk; M. A. Madaris, court crier; and Eugene F. Blaise, court reporter; and proceedings were had and done as follows, to wit:

WILLIAM A. PENNY, called on behalf of the plaintiff, being first duly sworn testified as follows:

Direct examination:

Q. State your name?
A. Wm. A. Penny.

Mr. PANCOAST: The defendant interposes a motion to dismiss this case because of lack of jurisdiction of the court, the defendant in the court below having filed an application for a change of venue.

35 The COURT; Present your motion.

Mr. PANCOAST: We offer in evidence this affidavit and also transcript of the probate court in support of the motion.

Which affidavit and transcript appear on pages — and — of this record.

Which motion is by the court overruled. To which ruling of the court the defendant then and there excepts.

Mr. PANCOAST: I want to object to the introduction of any testimony in this case for the reason that there is no jurisdiction in this court to try the action of forcible entry and detainer upon the pleadings—the pleadings of the plaintiff showing on its face that the question of the title of land is involved.

Which objection is by the court overruled. To which ruling of the court the defendant then and there excepts.

Q. State your name to the stenographer?
A. William A. Penny.
Q. What is your age?
A. Forty-nine.
Q. Where do you live and what is your business?
A. Kay county, Oklahoma; I am a farmer.
Q. Where were you born?
A. Illinois.
Q. I will ask you if you are the plaintiff in this case?
A. I am.
Q. You are the plaintiff in this case?
A. Yes sir.
Q. I will ask you whether or not you are the homestead entryman to the S. W. quarter of section 31, township 26, north range one east of the Indian meridian, Kay county, Oklahoma Territory?

Defendant objects as not the best evidence, which objection is by the court sustained. To which ruling of the court the plaintiff then and there excepts.

36 Q. Do you reside upon the S. W. quarter of section 30, township 26, range one east of the Indian meridian, Kay county, Oklahoma Territory?

A. Yes sir.
Q. Have you your homestead entry for that quarter section?

Defendant objects as incompetent and not the best evidence, which objection is by the court overruled. To which ruling of the court the defendant then and there excepts.

A. Yes sir, I have it.
Q. You may produce it. (Witness produces the instrument.)

Plaintiff here offers in evidence the homestead receipt, marked Exhibit "A," which appears on page 46 of this record.
Defendant objects as incompetent, irrelevant and immaterial.

Q. Do you know whose signature that is?
A. Mr. Scott's, the receiver of the land office; he signed it in my presence.
Q. Did you see him sign it?
A. Yes sir.
Q. Is that his signature there?
A. Yes sir.

Mr. KING: Plaintiff now offers in evidence Exhibit A.
Defendant objects as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the defendant then and there excepts.
Said Exhibit A is in the words and figures as follows, to wit:
Q. I will ask you whether or not you were the plaintiff in the contest case of William Penny against C. R. McClung, before the Land Department, for this quarter section of land mentioned?
A. Yes sir.

Plaintiff now offers in evidence the departmental decisions marked Exhibit "B" and attached to the answer in the case.
Which Exhibit B, which appears on pages — to — inclusive.

Q. Mr. Penny, how long have you been upon this land?
A. Since the opening; that is, that has been my home ever since the opening.
Q. When was that?

37 Defendant objects as immaterial, which objection is by the court sustained. To which ruling of the court the plaintiff then and there excepts.

Q. I will ask you whether or not you served a notice upon the defendant in this case Mrs. McClung?
A. Yes sir.
Q. Have you that notice with you?
A. Yes, sir, a copy of it.
Q. I will ask you to take that paper marked Exhibit "C" and state whether or not you served a copy of that on Mrs. McClung?
A. I did, on the ninth day of May.
Q. How did you do that?
A. By personally delivering it to her.

Q. Do you know it was a true copy?
A. Yes sir.

Plaintiff here offers in evidence Exhibit "C."

Defendant objects to the introduction of Exhibit C as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the defendant then and there excepts.

Which Exhibit C is in words and figures as follows:—and appears on pages 47 of this record.

By the COURT:

Q. Is that your land?
A. Yes sir.

By the COURT:

Q. That is the amount in controversy in this suit?
A. Yes sir.
Q. I will ask you whether or not on the 9th day of May 1900, the defendant in this case, Ida McClung, was occupying any portion of this land?
A. Yes sir.
Q. I will ask you to state to the court what portion of the land she was occupying, and in possession of?
A. About 155 acres.
Q. How much of it did you have on that date?
A. Five acres.
Q. Have you a plat there showing that land and what part she occupied?
A. No sir.
38 Q. I will ask you whether or not she occupied it with your consent and approval?
A. No sir, she did not.
Q. Has she continued to occupy that up to the present time?
A. Yes, sir.
Q. Has she refused to deliver possession to you of that land?
A. Yes sir.
Q. You say she still occupies it?
A. Yes sir.
Q. Has your homestead been of record ever since you made it?
A. Ever since the 7th day of May 1900.
Q. Have you ever relinquished it?
A. No sir; I have not.
Q. Have you got a certified copy of the tract book of the land office?
A. Yes sir.

Witness here produces the certified copy of the tract book and the same is marked Exhibit "D" by the court reporter.

Plaintiff here offers in evidence the certified copy of the tract book, marked Exhibit "D."

Defendant objects to the introduction of Exhibit "D" for the reason that it is incompetent, irrelevant, and immaterial.

Offer withdrawn for the present.

Witness excused.

C. W. RANSOM, called on behalf of the plaintiff, being first duly sworn testified as follows:

Direct examination:

Q. State your name?

A. C. W. Ransom.

Q. Are you acquainted with the signature of Mr. Boles, the register of the land office at Perry?

A. Yes sir.

39 Q. Is that his signature? (Referring to Exhibit "D.")

A. I saw him write that signature on the bottom of this instrument and I am acquainted with it.

That's all.

Witness excused.

Mr. RANSOM: We now renew our offer of Exhibit "D."

Defendant objects as incompetent, irrelevant and immaterial, which objection is by the court sustained. To which ruling of the court the plaintiff then and there excepts.

And thereupon the plaintiff rests his case.

KYLE MCCLUNG, called on behalf of the defendant, being first duly sworn testified as follows:

Direct examination:

Q. State your name to the court:

A. Kyle McClung.

Q. Were you acquainted with Charles R. McClung in his lifetime?

A. Yes sir.

Q. Do you know when he died?

A. Two years ago, the 19th of this November coming, I believe is the date.

Q. You may state if you know, whether or not he at any time occupied the southwest quarter of section 30, township 26, range two east the land in controversy in this case?

Plaintiff objects as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the plaintiff then and there excepts.

A. Yes sir, I know.

Q. You may state if you know, when he began the occupancy of that land?

Plaintiff objects as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the plaintiff then and there excepts.

40 A. Some time in September 1897.

By the COURT:

Q. 1897?
A. The day of the opening.

By the COURT:

Q. That is in 1893?
A. That's when it was.
Q. You may state if you know, under what circumstances he went upon that land?
A. For a homestead.
Q. You may state if you know whether he continued to occupy that land from that time until the time he died?
A. Yes sir, he did.
Q. Do you know Ida R. McClung, the defendant?
A. Yes sir.
Q. Do you know what relation she sustained to Charles R. McClung?
A. She was his wife.
Q. And now his widow?
A. Yes sir.

Witness excused.

Mrs. IDA MCCLUNG, called on behalf of the defendant, being first duly sworn testified as follows:

Direct examination:

Q. You may state your name?
A. Ida McClung.
Q. You may state what relation you are to Charles R. McClung?
A. Widow.
Q. You may state where you reside?
A. Southwest quarter section 30.
Q. On the land in dispute in this case?
A. Yes sir.
Q. How long have you resided there?
A. Ever since the opening.
Q. You may state why you are still residing upon that land, and what claim you are making to it?

Plaintiff objects as incompetent, irrelevant and immaterial,
41 which objection is by the court overruled. To which ruling of the court the plaintiff then and there excepts.

Q. Why are you still residing on it?
A. As my home.
Q. Are you claiming the land itself, or are you claiming simply its right of possession?

Plaintiff objects as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the plaintiff then and there excepts.

A. Both.

Q. You may state if it is your purpose at any time in the future or as soon as you can to contest the right of Penny to the title of that land—assert your claim in court as to the title of the land?

Plaintiff objects as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the plaintiff then and there excepts.

A. Yes sir.
Q. What is the value of that land?

A. Plaintiff objects as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the plaintiff then and there excepts.

Q. If you know the value of the land, state it?
A. Five thousand dollars.

Plaintiff moves to strike out the answer of the witness.

Q. Do you know the value of the land in the vicinity of that?
A. Yes sir.
Q. Now state what it is worth?

Plaintiff objects as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the plaintiff the- and there excepts.

42 A. It is five thousand dollars.

Q. You may state if your husband was a native-born citizen of the United States?

Plaintiff objects as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the plaintiff then and there excepts.

A. He was.
Q. Do you know whether he had ever had a homestead or not under the homestead laws, other than this one?
A. No, sir.

Plaintiff objects as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the plaintiff then and there excepts.

Q. You state he never did?
A. No sir, he never did.
Q. State if you know whether or not he ever entered the Cherokee Outlet prior to the sixteenth day of September, subsequent to the President's proclamation?
A. He did not.

Q. Plaintiff objects as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the plaintiff then and there excepts.

Q. What's that?
A. No sir, he did not.

Q. State your age?
A. Twenty-nine.
Q. Are you a native-born citizen of the United States?
A. Yes sir.
Q. Are you qualified to make homestead entry of lands in the Cherokee Outlet?
A. Yes sir.
Q. There was a contest wasn't there, between your husband and Mr. Penny over this land?
43 A. Yes sir.
Q. Have you continued to occupy this land since the termination of that contest for the purposes you have stated?
A. Yes sir.
Q. And are still occupying it?
A. Yes sir.

Cross-examination:

Q. Mrs. McClung, is it not a fact, you own more than 160 acres of land in this county—the title thereto?

Defendant objects as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the defendant then and there excepts.

A. Yes sir.

Redirect examination:

Q. Have you a family?
A. Yes sir.
Q. What does it consist of?
A. Five children.
Q. All under age?
A. Yes sir.
Q. You are not married at this time?
A. No sir.

Recross-examination:

Q. You are the administrator of the estate of your deceased husband?
A. Yes sir.
Q. And have been since the time an administrator was first appointed?
A. Yes sir.

44 By the COURT:

Q. How much of this land have you in actual possession at this time?
A. About 155 acres.

Witness excused.

Mr. PANCOAST: The defendant offers in evidence the decision of the department, letter A, dated August 24, 1895, marked Exhibit E,

the decision of the Interior Department, marked Exhibit F, the decision of the Department of the Interior, Sept. 24, 1897, marked Exhibit "G," the decision of the Department of the Interior, Aug. 16, 1898, marked Exhibit "H," the decision of the Department of the Interior March 3, 1899, marked Exhibit "I," and the decision of May 1, 1899, marked Exhibit "J."

Mr. RANSOM: To each of which instruments and documents, the plaintiff objects as incompetent, irrelevant and immaterial, and inadmissible.

Which objection is by the court overruled. To which ruling of the court the plaintiff then and there excepts.

Which Exhibit "E," "F," "G," "H," "I," "J" are as follows:

45 Ex. "A."

4–138.

Receiver's duplicate receipt No. 10605. Application No. 10605.

Homestead.

RECEIVER'S OFFICE, PERRY, OKLAHOMA, *May* 7, 1900.

Received of William A. Penny, the sum of fourteen dollars being the amount of fee and compensation of register and receiver for the entry of lots 3 and four & E. ½ S. W. ¼ (or S. W. ¼) of section 30 in township 26 N. of range 1 E. I. M., under section 2290, Revised Statutes of the United States.

JOEL R. SCOTT, *Receiver.*

$14.

Allowed under Commissioner's letter H of April 1900.

NOTE.—It is required of the homestead settler that he shall reside upon and cultivate the land embraced in his homestead entry for a period of five years from the time of filing the affidavit, being also the date of entry. An abandonment of the land for more than six months works a forfeiture of the claim. Further, within two years from the expiration of the said five years he must file proof of his actual settlement and cultivation, failing to do which, his entry will be canceled. If the settler does not wish to remain five years on his tract he can, at any time after fourteen months, pay for it with cash or land warrants, upon making proof of settlement and cultivation from date of filing affidavit to the time of payment.

See note in red ink, which registers and receivers will read and explain thoroughly to person making application for lands where the affidavit is made before either of them.

Timber land embraced in a homestead, or other entry not consummated, may be cleared in order to cultivate the land and improve the premises, *but for no other purpose.*

If, after clearing the land for cultivation, there remains more timber than is required for improvement, there is no objection to the settler disposing of the same. But the question whether the

land is being cleared of its timber *for legitimate purposes* is a question *of fact* which is liable to be raised at any time. If the timber is cut and removed *for any other purpose* it will subject the entry to cancellation, and the person who cut it will be *liable to civil suit* for recovery of the value of said timber, *and also to criminal prosecution* under section 2461 of the Revised Statutes.

46 To Ida McClung:

You are hereby notified and required to quitleave and vacate lots 3 and 4 and east one-half of S. W. ¼ section thirty in township twenty-six north of range one east of the Indian meridian, Kay county, Oklahoma Territory (said tract being in the fractional southwest one-fourth of said section).

That should you fail, refuse or neglect to comply with the requirements of this notice, suit will be brought against you by the undersigned after three days from the delivery hereof to recover possession of any and all portions of said tract still re*tiend* in your possession.

Dated May 9, 1900.

WILLIAM A. PENNY,
Homestead Entryman of said Tract.

Ex. "C."

47 EXHIBIT "E."

"H." S. M. C. P. DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE, WASHINGTON, D. C., *Aug.* 24, 1895. W. A. E. N. W. J. W. W. M. W. D.

Doc. 6, case 8427.

Address only the Commissioner of the General Land Office.

CHAS. R. McCLUNG and WM. PENNY *vs.* P. A. BIRDSELL. } Involving H. E. No. 5963, for the S. W. ¼ Sec. 30, Tp. 26 N., R. 1 E., I. M.

Register and receiver, Perry, Okla.

SIRS: On September 19, 1893, Perry Birdsell made homestead entry No. 209, for the S. W. ¼, sec. 30, tp. 26, N. R. 1 E.

On October 3, 1893, Charles R. McClung filed affidavit of contest against said entry, alleging priority of settlement.

On October 25, 1893, William A. Penny, also filed affidavit of contest against said entry, alleging priority of settlement.

On December 15, 1893, Penny made a motion to intervene in the case of McClung *vs.* Birdsell, and in your letter of September 12, 1894, you state that these cases were consolidated and set for hearing on February 23, 1894, and continued until April 2d, 1894.

On March 21, 1894, Birdsell relinquished all right to this tract and on March 28th, following McClung made homestead entry No. 5963, therefor.

You heard the case between McClung and Penny, on April 27th, and held Penny disqualified. Penny appealed on May 12, 1894.

The disqualification was based upon Penny's having made the race on September 16, 1893, from the Ponca reservation, near
48 where the Arkansas river intersects the north line of said reservation. At the time that said case was first considered by this office, entering from an Indian reservation on the east was not held to disqualify, and so the case was returned by letter "H," of March 11th, 1895 for further hearing.

On May 16, 1895, the department, in the case of Cagle *vs.* Mendenhall, decided that entering from an Indian reservation did disqualify. On June 11th, 1895, both parties appearing by their attorneys, McClung renewed his motion that the contest of Penny be dismissed, and you sustained said motion. Said ruling is in harmony with departmental decision above cited, and is therefore sustained and the contest of Penny is hereby dismissed, subject to appeal.

You will notify both parties hereof.

Respectfully,

E. F. BEST,
Acting Commissioner.

Endorsements: "H" 1953. Aug. 24, 1895–Aug. 27, 1895. Chas. R. McClung & Wm. A. Penny *vs.* P. A. Birdsell, H. E. # 5963, S. W. ¼ 30—26—R. 1 E. Your decision sustained and contest of Penny is dismissed—subject to appeal. Notify both parties.

United States Land Office.

PERRY, OKLA. TER., *October 3rd*, 1900.

I, Alfred H. Boles, register of the United States land office located at Perry, Oklahoma Territory, do hereby certify that the above and foregoing decision is a true and exact copy of the original decision in the case of Penny *vs.* McClung, now on file in my office. Being acting Commissioner's decision of Aug. 24, 1895.

ALFRED H. BOLES, *Register.*

(Stamp. 10 cts. 10, 3, 1900. A. H. B.)

49 EXHIBIT "F."

S. W. M. DEPARTMENT OF THE INTERIOR,
WASHINGTON, *August* 28, 1896.

CHARLES R. McCLUNG and WILLIAM PENNY
vs.
P. A. BIRDSELL.

The Commissioner of the General Land Office.

SIR: On September 19, 1893, Perry Birdsell made homestead entry for the S. W. ¼ of section 30, T. 26, N. R. 1 E. Perry land district, Oklahoma Territory.

Afterwards, affidavits of contest were filed by Charles R. McClung, and William A. Penny, respectively, each alleging priority of settlement.

On March 21, 1894, Birdsell relinquished all right and interest in the land; and a contest followed between McClung and Penny, McClung alleging that Penny was disqualified, by reason of having made the race on September 16, 1893, from the Ponca reservation.

Your office decision of August 24, 1895, holds that Penny was disqualified, citing in support thereof the departmental decision in the case of Cagle *v.* Mendenhall (20 L. D. 446).

Said decision of your office was correct and is hereby affirmed.

The papers transmitted by your office letter "H," of December 27, 1895, are herewith returned.

Very respectfully, JNO. M. REYNOLDS,
Acting Secretary.

50 4–497.

Refer in reply to this initial, "H."

J. L. M. DEPARTMENT OF THE INTERIOR, M. W. D.
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Sept.* 19, 1896.

Doc. 6, case 8427.

C. R. McCLUNG and WM. PENNY *vs.* P. A. BIRDSELL. } Involving S. W. ¼ Sec. 30, T. 26 N., R. 1 E., Covered by H. E. No. 5963, Formerly H. E. No. 209.

Register and receiver, Perry, Okla.

GENTLEMEN: In reference to the above-entitled case, I enclose herewith a copy of departmental decision of August 28, 1896, affirming the decision of this office, dated Aug. 24, 1895.

Notify all parties in interest of said departmental decision, and if, at the expiration of the time allowed for filing motion for review, (see rules 76, 77, and 78 of practice, circular, 5, L. D. 204) no such motion has been filed in your office and you have not been informed that such motion has been filed here, you will promptly report the fact for final action, transmitting therewith evidence of service of notice of decision of the department.

Respectfully, E. F. BEST,
Ass't Commissioner.

Endorsements: H. 3173, Sept. 19, 1896. Sept. 22, 1896. C. R. McClung & Wm. Penny *vs.* P. A. Birdsell. H. E. 5963, S. W. ¼ sec. 30, T. 26, 1 E. Departmental decision affirming Com'r of Aug. 24, 1895, 30 ds. for filing motion for review.

United States Land Office.

PERRY, OKLA. TER., *October 3rd*, 1900.

I, Alfred H. Boles, register of the United States land office at Perry, Oklahoma Territory, do hereby certify that the above and foregoing decision is a true and exact copy of the original decision in the case of Penny *vs.* McClung now on file in my office. Being

acting Sec't'y's decision of Aug. 28, 1896 and Comm's letter of Sept. 19, 1896.

ALFRED H. BOLES, *Register.*

Stamp. 10 cts. 10, 3, 1900. A. H. B.

51 EXHIBIT "G."

Vol. 23, No. 586.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *September* 24, 1897.

CHARLES R. McCLUNG and WILLIAM PENNY
v.
P. A. BIRDSELL. } Motion for Review.

The Commissioner of the General Land Office.

SIR: This department, on August 28, 1896, rendered a decision in the case of Charles R. McClung and William A. Penny against Perry A. Birdsell, involving the S. W. ¼ of sec. 30 T. 26, N., R. 1 E., Perry land district, Oklahoma Territory.

The tract described was originally entered under the homestead law by said Birdsell on September 19, 1893.

On October 3, 1893, McClung filed affidavit of contest against Birdsell's entry, alleging priority of settlement.

On October 25, 1893, Penny filed affidavit of contest, alleging priority of settlement; and on December 15, 1893, Penny applied to intervene in the case of McClung *v.* Birdsell. The application was granted, and the cases were consolidated.

On March 21, 1894, Birdsell relinquished all right, title and claim to the land—leaving only Penny and McClung in the case.

On March 28, 1894, McClung made homestead entry of the tract. This ought not to have been allowed while the controversy between him and Penny as to priority of settlement was pending and unadjudicated.

A hearing was had (after several continuances), on April 26, 1894.

At the hearing Penny was his own and only witness. His testimony appeared to show that he was the prior settler; but it
52 also showed that he had made the run into the Territory from the Ponca Indian reservation, east of the land opened to settlement on September 16, 1893.

Penny having rested his case after submitting his testimony, counsel for McClung moved that Penny's contest be dismissed, on the ground that Penny's testimony showed that he was disqualified as an entryman, because of having entered the Territory from the Ponca Indian reservation.

The local officers sustained the motion, and dismissed the contest. Penny appealed to your office.

At that time it was the holding of your office that the fact that a person had made the run into the territory opened to settlement and entry on September 16, 1893, from any Indian reservation on

its eastern boundary, did not disqualify such person from acquiring land in said territory. Your office therefore, on March 11, 1895, remanded the case to the local office for further hearing.

Before the arrival of the time set for such hearing, the department, in the case of Cagle *v.* Mendenhall, (20 L. D. 446) decided that entry from an Indian reservation on the east of the lands opened to entry as above did disqualify.

On June 11, 1895—the day set for the hearing in the case of Penny *v.* McClung—counsel for McClung renewed his motion that the contest be dismissed on the ground that Penny was disqualified. The local officers sustained the motion and dismissed the contest.

Penny appealed to your office—which, on August 24, 1895, affirmed the ruling of the local officers, as being in harmony with the departmental decision in the case of Cagle *v.* Mendenhall (*supra*).

Penny appealed to the department—which, on August 28, 1896, affirmed the decision of your office.

Two motions for review have been filed by Penny's counsel (local and resident, respectively) both earnestly contending that the departmental decision in the case of Cagle *v.* Mendenhall (*supra*)—upon which the several decisions on the case of Penny *v.* McClung have been based—was erroneous.

53 The department has recently, in the case of Brady *et al. vs.* Williams (23 L. D., 533), overruled its former holding in said case of Cagle *v.* Mendenhall, and held that entry from an Indian reservation on the east side of the territory opened to settlement September 16, 1893, does not disqualify a party making the run.

In view of the decision last above mentioned, the department, on January 15, 1897, entertained said motions for review.

Subsequently counsel for McClung filed a motion setting forth in substance the matters hereinbefore stated; directing attention especially to the facts that the local officers granted the motion to dismiss the contest on the ground that the contestant had entered the territory prematurely; that therefore no testimony was offered by McClung in consideration to that introduced by Penny tending to show that the latter was the prior settler; and asking that the case be remanded to the local office in order that such testimony may be taken.

The grounds of said motion would appear to be well taken. The departmental decision of August 28, 1896, is therefore hereby vacated and annulled. The case is remanded for a new hearing, at which both parties will be permitted to submit testimony bearing upon the question of priority of settlement. After such hearing the local officers will render decision in accordance with the facts as they may be made to appear at the hearing.

Very respectfully, WEBSTER DAVIS,
Acting Secretary.

Endorsed: Copy of Sec'y's decision omitted from letter "H," of Oct. 7, 1897. J. L. M.—Mrs. Jennie L. Monroe.

54 Refer in reply to this initial, "H."

J. L. M. DEPARTMENT OF THE INTERIOR, C. C. N.
GENERAL LAND OFFICE, H. W. S.
WASHINGTON, D. C., *Oct.* 7, 1897.

Doc. 6, case 8427
(Address only the Commissioner of the General Land Office:)

C. R. McCLUNG and WILLIAM PENNY
vs.
P. A. BIRDSELL. } Priority of Settlement.

Register and receiver, Perry, Oklahoma.

SIRS: In reference to the above-entitled case, you will find herewith, a copy of departmental decision of Sept. 24, 1897, directing a new hearing in the same, "at which both parties will be permitted to submit testimony *h*earing upon the question of priority of settlement," involving the S. W. ¼, sec. 30, T. 26, R. 1 E., covered by H. E. No. 5963.

Penny's affidavit is herewith returned and you will proceed in the premises outlined by the decision of the department, and in due time report action taken, returning therewith, Penny's affidavit and also transmitting the evidence of service of notice of the decision of the department and your action setting a day for the hearing:

Respectfully,
E. F. BEST,
Ass't Commissioner.

Endorsements: H. 4148. Oct. 7, 1897, Oct. 11, 1897. C. R. McClung and Wm. A. Penny *v.* P. A. Birdsell—H. E. 5963, S. W. 30—26—1 E. Dept. decision of Sept. 24, 1897, returning Penny's affidavit and ordering a hearing.

55 United States Land Office.

PERRY, OKLA. TER., *October 3rd*, 1900.

I, Alfred H. Boles, register of the United States land office at Perry, Oklahoma Territory, do hereby certify that the above and foregoing decision is a true and exact copy of the original decision of the Secretary of the Interior in the case of Penny *vs.* McClung now on file in my office. Being acting Secretary's decision of review dated Sept. 24, 1897, and Commissioner's letter of Oct. 7, 1897.

ALFRED H. BOLES, *Register.*

Stamp. 10 cts. 10/3/1900. A. H. B.

U. S. LAND OFFICE, PERRY, O. T.

We hereby accept service of the decision of the Commissioner of the General Land Office of date August 16, 1898 in the case of William A. Penny *vs.* Charles R. McClung, and of our right of appeal therein within sixty days from this date Copy this day received.

Dated October 15th, 1898.

MORGAN & PANCOAST,
Att'ys for Charles R. McClung.

56 EXHIBIT "H."

"H." DEPARTMENT OF THE INTERIOR, H. W. S.
GENERAL LAND OFFICE, T. W. A.
W. M. C. WASHINGTON, *August* 16, 1898. L. D. P.

Doc. 6, case 8427.
Address only the Commissioner of the General Land Office.

WILLIAM A. PENNY vs. CHARLES R. McCLUNG. } Involving Title to S. W. ¼, Sec. 20, Twp. 26, R. 1. E. Exhibit "H."

Register and receiver, Perry, Okla.

GENTLEMEN: On September 19, 1893, Perry A. Birdsell made homestead entry No. 209, for the S. W. ¼, sec. 20, twp. 26, R. 1 E.

On October 3, 1893, Charles R. McClung filed his affidavit of contest alleging prior settlement.

On October 25, 1893, William A. Penny also filed affidavit of contest against said entry alleging priority of settlement, and on December 15, 1893, filed his motion to intervene in the case of McClung *vs.* Birdsell.

The two contests were consolidated and a hearing was set for April 2, 1894.

On March 21, 1894, Birdsell relinquished and McClung on March 28, 1894, made homestead entry No. 5963.

Hearing was had between Penny and McClung and you held that Penny was disqualified because he made the race on September 16, 1893, from the Ponca reservation. On March 11, 1895, this office held that entering the Territory from the reservation did not disqualify Penny and remanded the case for a hearing on its merits.

On May 16, 1895, it was held by the department in the case of Cagle *vs.* Mendenhall (20 L. D. 447) that entering from an
57 Indian reservation disqualified a settler.

On June 11, 1895, when the case was called for a further hearing McClung renewed his motion to dismiss Penny's contest, which was sustained and your decision was affirmed by this office on August 24, 1895.

On appeal the department affirmed the decision of this office dismissing the contest.

On a motion for review the department on September 24, 1897, reversed its former decision and ordered a hearing on the merits of the case to determine the rights of the parties.

The said hearing was had on March 17, 1898. You found that Penny was the prior settler, had established and maintained his residence on the land and, thereupon you recommended that McClung's entry be canceled.

The evidence shows that Penny on September 16, 1893, entered the Territory from the Ponca reservation and reached the land in dispute a few minutes prior to one p. m.; that he stuck a stake, dug a hole and threw up a mound; he remained on the tract until next

morning, selected a place for a dugout and left for the local office to make entry; he returned to the land September 19, commenced the excavation of a dugout and left the claim on September 20; before leaving he employed two men to work on his dugout; he returned on the 22nd and helped to work on his dugout and in the course of a week it was built up three logs high, with the exception of one side, when he left for Kansas to get some lumber for the roof; Penny worked on the dugout at intervals until it was finished. He brought his family to the land, November 17, 1893. He moved to the claim some kitchen and household furniture. He was living on the claim at the time of the first trial in April 1894, and continued to live there until August 1894, when he went with his family to Kansas where he remained until February 1895. After February 1895, Penny's family was on the land at intervals.

The testimony is not definite as to the time Penny was actually on the land, with the exception of one or his witnesses who testifies that Penny left the land after his return in February 1895,
58 on March 17, 1895, and returned June 2; again left June 18, and returned November 6. Again left in May and returned October 17, 1896; that from October 17, 1896, to June '97, the family were on the land; that in June '97, they left the land and were absent about two months. Since their return in September they had lived on the land. The evidence shows that Penny was on the land perhaps one-third and his family one-half of the time from February '96 to September '97. In September '97, Penny built a house and since that time his residence has been continuous.

It appears that as early as October 3, 1893, McClung had fenced in with wire all of the land except Penny's dugout, which was on the edge of the claim and partly in the road and that Penny had been restrained by order of court from entering the inclosure. Penny had applied to the court for a part of the land, but it seems he did not successfully prosecute his claim or allowed, by default, an injunction against him to be made perpetual or until the rights of the parties were settled by the department.

Penny had no horses or implements of husbandry on his claim; these he kept in Kansas where for three seasons he cultivated crops. His reason for this is that he had no land to cultivate or to erect suitable buildings upon to keep them.

The evidence shows that McClung made his first settlement on the land September 19, 1893, by sticking a stake and throwing up a mound. He and his witnesses testify that he placed a tent on the northeast corner. This tent was blown down and again set up the next morning. He immediately commenced his improvements and on October 3, had practically the whole of the land fenced in, his house built and within a week thereafter he established his residence which he has since maintained. He has made improvements aggregating in value with the money he paid for Birdsell's relinquishment about $1000.

Prior to September, 1897, the only improvements Penny had on the claim was his dugout. He was fenced out or off the claim, and by order of court he was enjoined from entering thereon.

59 Penny was dilatory in completing his dugout and getting his family on the claim, but when it is considered he was off and on there at intervals working upon his dugout, it would not be a just conclusion upon the facts to hold that he did not establish a residence on the land until November 17, 1893, when he moved his family to the claim.

It is contended that Penny after August 1894, did not maintain his residence on the land. In the presence of an adverse claim, the rulings require the maintenance of actual residence by the settler who relies on his prior settlement. McInnes *vs.* Cotter, 21 L. D. 97; Foote *vs.* McMillan 22 L. D. 280; Benjamin *vs.* Endaily, 25 L. D., 103; Thompson *vs.* Craver, 25 L. D. 279; and Griffin *vs.* Smith, 25 L. D. 329.

The continuity of the prior settler's residence cannot be broken except at the risk of loss of any prior or superior right he may possess over and adverse settler. In Thompson *vs.* Craver (*supra*) it was held the prior settler "must stand upon his settlement—the allegation of superior rights to the other parties to the cause—and so alleging it is incumbent upon him not only to show settlement but continuous residence thereon."

Subsequent to August 1894, it cannot be said that Penny has complied with the law under these rulings. He offers as an excuse that it was impossible to earn a support on the land as he had none to cultivate; that all the agricultural land having been fenced in by McClung and an injunction having been issued against his entrance into the inclosure, he was compelled to go elsewhere to find land he could cultivate.

The unfair dealing of McClung should estop him in urging a forfeiture of Penny's superior right to the land by reason of his absences therefrom, for doubtless McClung's acts contributed thereto if they did not occasion Penny's absences. However, if they did not, following the ruling in the case of Brady *vs.* Williams, (23 L. D., 532; and 25 L. D., 55 and 402) made on a motion for rehearing but not reported in full, the department said:

"It is hardly to be expected under the circumstances surrounding this case that Brady should be required to spend all his time
60 on the land. Under the ruling in Cagle *vs.* Mendenhall (20 L. D. 447) which controlled the question at issue in the case at bar, until overruled, there was but little incentive to those who made the race from the east side of the Outlet to do more in the way of residence and improvement than a compliance with the terms of the law, with the view of preserving their rights until the question should be finally determined."

This ruling is directly pertinent to the case under consideration. Under it Penny must be held as having complied with the law as to his residence. It being found that Penny was the first settler, that he established his residence on the land within a reasonable time and that he has maintained his residence thereon, it must be declared that he has the superior right. Your decision is therefore affirmed and in the event of this decision becoming final, McClung's entry will be canceled and Penny allowed to make entry of the land.

Notify the parties hereof and McClung of his right of appeal.

Respectfully, F. W. MONDELL,
Act'g Commissioner.

Endorsements: "H," 4731. August 16, 1898–August 19, 1898. William A. Penny *vs.* Charles R. McClung, for the S. W. ¼, sec. 30, 26,—R. 1 E. Decision of G. L. O., of August 16, 1898. Affirming decision of local office, subject to McClung's appeal.

United States Land Office.

PERRY, OKLA. TER., *October* 3, 1900.

I, Alfred H. Boles, register of the United States land office at Perry, Oklahoma Territory, do hereby certify that the above and foregoing decision is a true and exact copy of the original decision of the Commissioner of the General Land Office in the case of Penny *vs.* McClung, now on file in my office. Being acting Commissioner's decision of Aug. 16, 1898.

ALFRED H. BOLES, *Register.*

Stamp. 10 cts. 10/3/1900. A. H. B.

61 EXHIBIT "I."

Vol. 26, No. 658.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *March* 3, 1899.

WILLIAM A. PENNY
vs.
CHARLES R. McCLUNG. } Contest of Homestead Entry.

The Commissioner of the General Land Office.

SIR: On September 19, 1893, one Charles Birdsell made homestead entry for the S. W. ¼ of sec. 30, T. 26, N. R. 1 E. Perry land district, O. T.

On October 3, 1893, Charles R. McClung filed affidavit of contest against Birdsell's entry, alleging priority of settlement.

On October 25, 1893, Penny filed affidavit of contest, alleging priority of settlement; and on December 15, 1893, he applied to intervene in the case of McClung *v.* Birdsell. The application was granted, and the cases were consolidated.

On March 21, 1894, Birdsell relinquished all right, title, and claim to the land—leaving only Penny and McClung in the case.

On March 28, 1894, McClung made homestead entry of the land, (which the local officers ought to have allowed while the controversy between him and Penny as to priority of settlement was pending and unadjudicated.)

A hearing was had, (after several continuances) on April 26, 1894.

At said hearing Penny was his own and only witness. His testimony appeared to show that he was the prior settler; but it also showed that he had made the run into the Territory from the Ponca

Indian reservation, east of the land opened to settlement on September 16, 1893.

Penny having arrested his case after submitting his testi-
62 mony, counsel for McClung moved that Penny's contest be dismissed, on the ground that his own (Penny's) testimony showed that he was disqualified as an entryman, because of having entered the Territory from the Ponca Indian reservation. The local officers sustained the motion and dismissed the contest.

Penny appealed; but your office, on August 24, 1895, and the department on August 28, 1896, sustained the action of the local officers, upon the grounds set forth in departmental decision of Cagle *v.* Mendenhall (20 L. D., 446).

A motion for review was filed, which was pending when the ruling in said case of Cagle *v.* Mendenhall was reversed in the case of Brady *v.* Williams (23 L. D. 533), which held, that entry from said Indian reservation did not disqualify a party making the run therefrom.

In view of said last-named ruling, the department, on September 24, 1897, remanded the case of Penny *v.* McClung to the local office, in order that McClung might be allowed to submit testimony tending to show that he was the prior settler.

The hearing for the purpose thus indicated has been had—beginning January 6, 1898. As the result of said hearing the local officers found in favor of Penny, and recommended that McClung's homestead entry be canceled.

McClung appealed to your office; which, on August 16, 1898, affirmed the decision of the local officers. McClung has appealed to the department.

The numerous grounds of error alleged by the appellant may be summed up in the following:

First. It was error to hold that Penny was the earlier legal settler; *i. e.* that his acts in connection with the land, prior to the date of McClung's settlement, were sufficient to initiate a claim to the land.

Second. It was error not to hold that Penny failed, in the presence of the adverse claim of McClung, to maintain residence and made improvements upon the land as required by law.

63 Penny's testimony relative to his arrival and the improvements made by him immediately thereafter is as follows:

I arrived on the tract three minutes before one o'clock; I stuck a stake, tied my handkerchief on the stake, dug a hole, and threw up a mound; later on in the evening I dug off, on the bank of the river, twenty or thirty spades of dirt, where I expected to start a dugout; and in the evening or at night I used to go down the hill to get my horses to water, and others used it for the same purpose; then I thought it would be the best place to make a road to get down to the river; and so, *later on*, I marked out where I intended to dig my dugout; *it was on Wednesday*, September 20; I left word for Mr. Webb, and Mr. Coffelt, and others, to start my dugout there.

Penny does not state at what time of day on Wednesday he marked out where he intended to make his dugout; but this infor-

mation is supplied by witness, McBride, who testifies that Penny marked off the ground, and he and Coffelt began digging about ten o'clock Wednesday morning.

The local officers in their decision say regarding Penny; "During the evening of the 16th he dug off the bank of the river twenty or thirty spades of dirt, *at a point where* he afterwards started a dugout." His own testimony, hereinbefore quoted, shows that such was not the case; he also testifies elsewhere to the same effect thus:

Q. State just what the condition of your dugout was when you came back on the evening of the 19th—what has been done to it:

A. There hadn't been anything done to it; it wasn't started nor marked out until the morning of the 20th.

McClung testifies that he went upon the land on the day of the opening (September 16, 1893); that on that day he laid no claim thereto, as he found signs of settlement thereon—to wit, a few sods piled up near one corner, and a stake to which was attached a piece of paper bearing the name of Smith. McClung and several of his family kept a watchful eye on the tract for several days; and seeing no one upon it or apparently laying claim to it, and no improvements made, he concluded that if any one ever had claimed, such party had abandoned it, and on Tuesday, September 19th, he went upon the land, drove a stake, wrote his name upon it, attached a piece of white cloth to it, dug a hole near it, and with the dirt taken from the hole piled a mound about the stake. About four o'clock of the same day he put up a tent, in which he put some bed clothing, cooking utensils, and other articles. That evening the
64 tent blew down, and McClung went to his cousin's tent and stayed all night; but on Wednesday morning, September 20th, about eight o'clock, he again put up the tent—which was his home from that time until he built his house. During the day he learned that lumber could be had at White Eagle, a dozen miles away; on Thursday, September 21, he bought lumber for a house, brought it to the land, and started a foundation Thursday evening; worked on it all day Friday, and by Saturday night, September 23, had it completed excepting part of the shingles on the roof, he then went to Kansas after his family, who came to the land in controversy and took up their residence in the house built upon it some time in the first week of October.

The preceeding statement is not only that of the defendant McClung, himself, but that of the parties who assisted him in putting up his tent Tuesday afternoon and Wednesday morning, or who saw them.

Kyle McClung, at whose tent the defendant stayed from the day of the opening until Tuesday, testified that the latter took his tent from the witness's place, adjacent to the tract in controversy, to said tract, and put it up Tuesday afternoon, about four or five o'clock; the wind was very high, and it blew down; defendant stayed all night at witness's tent, but early next morning, about eight o'clock, went over and re-erected his tent.

Fielding McClung testified to helping put up the tent Tuesday

afternoon; did not assist in putting it up again on Wednesday morning, but saw it soon after it was re-erected.

Walter F. McClung testified to seeing the defendant put up the tent Tuesday afternoon, and to seeing it again, standing about eight or nine o'clock the next morning.

Charles Smith testified that he rode by the tract in controversy, on his way to the Tonkawa reservation, on Tuesday evening, about sunset, and saw a tent on the tract in controversy, partly blown down; returning the next morning, he rode by the place about nine o'clock, and the tent had been re-erected.

65 J. W. Up Dyke testified to riding into the Tonkawa reservation with the last-mentioned witness, and corroborated his statements as to the tent.

Park Bridges has a deposition in the case, in which he states that he assisted McClung in putting up his tent Tuesday afternoon, and again Wednesday morning.

McClung and his family continued to reside upon the tract until the hearing. His improvements are correctly set forth by the local officers as follows:

He has a three-room house, a cellar, a stable and barn 24 x 24 feet, corn crib and bin 24 x 12, another bin which holds five hundred bushels; smoke-house, three acres in orchard; half an acre in shade trees; about sixty acres in pasture; five or six acres in hog lot; has cultivated in various ways as above set forth, together with ordinary crops, about one hundred acres of land. He has practically the entire claim under fence.

He paid Birdsell two hundred and ninety-five dollars for Birdsell's relinquishment; his improvements have cost him over seven hundred dollars; thus making his entire expenditure for and upon the land more than one thousand dollars.

The local officers find also that—

Prior to September, 1897, the only substantial improvement Penny had on this land was the dugout, which he and his family resided in at intervals since the opening of the Outlet. He has kept on the place no domestic animals for any length of time, nor any implements that are necessary for farming purposes. The most of this kind of property he has kept with him in the State of Kansas, at the place where he has cultivated crops. Penny gives as a reason for failing to make any other and more extended improvements and cultivation of the land, the fact that McClung had secured a restraining order in the district court, confining to him the small portion of land immediately around his house and along the creek banks, which was unsuited for agricultural purposes. His dugout is situated in the public road; he had no land suitable for building purposes; and none on which he could erect or construct fences or corrals to hold stock. It appears that Penny made no effort to dissolve the restraining order secured against him by McClung.

Penny's entire expenditure upon the land up to the date of hearing would appear to have been from twenty-five to forty dollars.

In view of the facts above set forth your office holds that McClung's conduct should estop him from urging a forfeiture of Penny's superior

right to the land by reason of his absences therefrom, and decides adversely to McClung, basing such action largely upon the
66 departmental decision of November 23, 1897, in the case of Brady *v.* Williams on motion for rehearing (not reported; see 25 L. D. 402.) In said decision the department said:

It is hardly to be expected under the circumstances surrounding this case that Brady should be required to spend all his time on the land. Under the ruling in Cagle *v.* Mendenhall (20 L. D. 447) which controlled the question at issue in the case at bar, until overruled, there was but little incentive to those who made the race from the east side of the Outlet to do more in the way of residence and improvements than a compliance with the terms of the law, with the view of preserving their rights until the question should be finally determined.

Your office finds that Penny was the first settler, that he established residence thereon within a reasonable time, and that, in the light of the foregoing departmental decision, he "must be held as having complied with the law as to his residence."

Counsel for Penny contend, in relation to McClung's placing of a tent upon the land as an act of settlement:

Conceding McClung's settlement as he claims it in his own testimony, it was first initiated at 4 p. m., September 19, 1893. At that time the homestead entry of Perry Birdsell was of record in the Perry land office. This is a very important fact in this case; for McClung could take nothing under a settlement made upon land segregated by homestead entry.

The department has frequently held, as in the case of Geer *v.* Farrington, (4 L. D., 410, syllabus):

Conceding that, while an entry stands uncanceled upon the record, settlers upon the land covered thereby acquire no rights as against the record entryman or the United States, yet as between such settlers, priority of settlement may be properly considered.

Birdsell relinquished all claim to the tract in controversy a few days after filing therefor; thereupon the land became subject to settlement and entry, and priority of settlement may properly be considered in determining the rights of claimants who were then upon the land.

It was incumbent upon Penny to follow his initial act of setting a stake and flag, digging a small hole, and throwing up a diminutive mound, on the day of the opening, within a reasonable time, by additional acts evidencing an intention to make a *bona fide* settlement. The act of throwing a few shovelfuls of dirt from the edge of the river bank, making less steep the slope down which
67 Penny and his neighbors led their horses to water, was not such an act as would evidence his intention to make a homestead settlement. He testifies that he was on the tract in person at four o'clock p. m. of the 19th of September, when McClung, according to the latter's testimony and that of several witnesses, put up a tent on the land in controversy. Counsel for Penny strongly intimate doubt as to whether McClung actually put up a tent on the 19th. However that may be, there is abundance of testimony that

he had a tent on the land at eight o'clock, or between eight and nine o'clock on September 20; and there is no witness who places the first stroke of work done toward building Penny's dugout earlier than ten o'clock on that day. Penny's conduct in connection with the land for years afterwards, according to the testimony of his own witnesses, disclosed an intention to do as little as possible and make a merely colorable compliance with the requirements of the homestead law. The quotation made by his counsel from the decision in the case of Brady *v.* Williams, on petition for rehearing (*supra*), that "there was but little incentive to those who made the race from the east side of the Outlet to do *more* in the way of residence and improvement, *than a compliance with the terms of the law*," cannot be extended to cover a case where the claimant has done far less than would constitute a compliance with the terms of the law. The restraining order to which reference is made in the decision of the local officers, is not a matter which can operate to excuse the failure of Penny to comply with the law, when the circumstances surrounding the making of that order are understood. Penny had instituted a suit in the local court against McClung involving the possession and occupancy of the land by these two rival claimants, and at the time fixed for the interlocutory hearing Penny did not appear, but made default; and upon the cross-petition of McClung and the showing made in support thereof, Penny was enjoined and restrained from interfering with the enclosure, property and improvements of McClung upon—the tract in dispute prior to the determination of the respective claims of the parties by the Land Department,
68 Penny never sought a vacation or modification of this restraining order, although it was the practice of the local courts, upon proper showing (judging from the numerous cases referred to in the testimony) to divide the possession and use of the land in controversy between opposing claimants.

In the case at bar, the register who signed the local officer's decision is not the register before whom the testimony was taken; and the question in issue is one of mixed law and fact.

The decision of your office holding McClung's entry for cancellation is hereby reversed, and Penny's contest is dismissed.

The papers transmitted by your office letter (H) of October 18, 1898, are herewith returned.

Very respectfully, E. A. HITCHCOCK, *Secretary.*

E. R. B.

Before the United States Land Office, Perry, Okla.

MAY 24TH, 1899.

We hereby accept service of notice of departmental decision dated March 18, 1899, in the case of William E. Penny, *v.* C. R. McClung, involving the S. W. ¼ sec. 30, T. 26, R. 1, E. by receipt of a true and correct copy of the same, on above date.

RANSOM & BAILEY,
Att'ys for Plaintiff.

——— ———,
Att'ys for Defendant.

69 4-497.

Refer in reply to this initial, "H."

J. L. M.
Doc. 6, case 8427.

DEPARTMENT OF THE INTERIOR, H. W. S.
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 18, 1899.

WM. A. PENNY
vs.
C. R. MCCLUNG.

Involving H. E. No. 5963, S. W. ¼, Sec. 30, T. 26 N., R. 1 E.

Register and receiver, Perry, Oklahoma.

GENTLEMEN: In reference to the above-entitled case, I inclose herewith a copy of departmental decision of March 3, 1899, reversing the decision of this office, dated August 16, 1898.

Notify all parties in interest of said departmental decision, and if, at the expiration of the time allowed for filing motion for review (see rules 76, 77, and 78 practice, circular 5 L. D. 204) no such motion has been filed in your office, and you have not been informed that such motion has been filed here, you will promptly report the fact for final action, transmitting therewith evidence of service of notice of decision of the department.

Resident counsel for both parties have been notified hereof. You will so advise Penny or his attorney, and that the time for him to file a motion for review will begin to run on this date.

Respectfully, BINGER HERMANN,
Commissioner.

Endorsements: "H" 5119, (M'ch 18" 1899 M'ch 21, 1899)—William A. Penny *vs.* C. R. McClung. S. W. ¼ sec. 30, T. 26, R. 1 E.—Departmental decision of March 3" 1899 reversing the decision of G. L. O. dated August 16", 1898. Doc. 1 P. 79.

United States Land Office.

PERRY, OKLA. TER., *October* 3*rd*, 1900.

I, Alfred H. Boles, register of the United States land office at Perry, Oklahoma Territory, do hereby certify that the above and foregoing decision is a true and exact copy of the original decision of the Secretary of the Interior in the case of Penny *vs.* McClung now on file in my office. Being Secretary's decision, dated M'ch 3, 1899 & Commissioner's dated M'ch 18, 1899.

ALFRED H. BOLES, *Register.*

(Revenue stamp. 10 cts.)
10/3/1900. A. H. B.

70 EXHIBIT "J."

Vol. 26, No. 658.

Motion for Review.

WILLIAM A. PENNY
v.
CHARLES R. MCCLUNG.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *May* 1, 1899.

The Commissioner of the General Land Office.

SIR: William A. Penny has filed a motion for review of departmental decision of March 3, 1899 (unreported), dismissing his contest against the homestead entry of Charles R. McClung, made March 28, 1894, for the S. W. ¼ of sec. 30, T. 26, N. R. 1 E., Perry, land district, Oklahoma Territory.

The facts of the case are fully set forth in said departmental decision complained of, and need not be herein repeated.

The numerous specifications of error may be summed up in the allegations that Penny's acts prior to McClung's settlement upon the land were sufficient to defeat the acquirement of any right thereto by McClung; that Penny's conduct in connection with the land for years after McClung's settlement and establishment of residence was not a proper subject for consideration by the department; that "the facts are notorious that Penny has been a *bona fide* settler upon this tract, claiming the same as his home since the day he originally claimed settlement, September 16, 1893;" and that the "restraining order" obtained by McClung should be considered a sufficient excuse for Penny's not residing upon, cultivating, and improving the land.

These allegations were presented to and considered by the department when the case was before it on appeal; and no reason now appears for arriving at a different conclusion with reference thereto than was enunciated in the decision heretofore rendered.

Certain of the allegations may very properly receive sepa-
71 rate consideration, to wit:

Inasmuch as there is no question but that Penny was the prior settler, it was error not to have awarded him the land:

Inasmuch as * * * all concur *that McClung was not the prior settler*, it was error not to have decided the case upon that point and awarded the land to Penny:

It was error to have considered the acts of McClung made upon land *which he had illegally and erroneously withheld from the use and occupation of Penny*, as evidence of a superior right.

These allegations beg the very question in issue—laying down premises which the department has held to be without foundation in fact. The department has found that Penny was not the prior settler; that McClung was the prior settler; that as Penny had failed

to initiate any claim to the land prior to McClung's settlement thereon; the restraining order procured by the latter was not "illegally and erroneously," but legally and properly issued.

The motion alleged further:

It was error not to have considered that Charles R. McClung testified in the case of McClung *v.* Winebrenner, that he was helping his brother build a house on September 21, 22, and 23.

The fact (if it was a fact) that McClung was helping his brother build a house on the days mentioned, would not prove that the testimony of the defendant and his witnesses (Charles R. McClung, Kyle McClung, Fielding McClung, Walter F. McClung, Charles Smith, Park Bridges, and J. W. Updyke) was false when they testified to assisting in erecting McClung's tent, or seeing it erected, on the land in controversy, between eight and nine o'clock on the morning of September 20 which was before Penny, according to his own testimony and that of his witnesses, had even marked out where he intended to construct his dugout.

The motion alleges further:

It was error to hold that cost of the entire improvements Penny has placed upon the land does not exceed twenty-five or forty dollars, whereas such cost largely exceeded two hundred dollars.

After the department (on September 24, 1897), remanded this case to the local officers for a further hearing, Penny hastened to make quite extensive improvements upon the land. But the local
72 officers (who found in favor of Penny) in their decision state that, prior to September 1897, the only substantial improvements Penny had made was the dugout—and that the dugout was not situated upon the land but in the public road. The finding of the local officers in this respect is fully sustained by the evidence.

It will be seen that the motion raises no question that was not presented to and considered by the department when the case was before it on appeal; and no reason appearing why the decision heretofore rendered should be disturbed, the motion is hereby denied, and herewith transmitted for the files of your office.

Very respectfully, E. S. HITCHCOCK, *Secretary*.

E. R. B.

Refer in reply to this initial, "H."

J. L. M. DEPARTMENT OF THE INTERIOR, H. W. S.
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* 8, 1899.

Doc. 6, case 8427.

Address only the Commissioner of the General Land Office.

WM. A. PENNY *vs.* C. R. McCLUNG. } Involving S. W. ¼, Sec. 30, T. 26 N., R. 1 E., Covered by H. E. No. 5963.

Register and receiver, Perry, Oklahoma.

73 GENTLEMEN: In reference to the above-entitled case, I inclose herewith a copy of the decision of the honorable Secre-

tary of the Interior, dated May 1", 1899, denying the motion for review of departmental decision of March 3", 1899, which was in favor of McClung.

Said case is accordingly hereby closed. Notify the parties in interest.

The entry remains intact.

Respectfully,

BINGER HERMANN,
Commissioner.

Endorsements: (May 11, 1899. "H" 5244. May 8", 1899.) S. W. ¼, sec. 30, T. 26, R. 1 E. Department decision of May 1", 1899, denying motion for review of departmental decision of March 3", 1899, in favor of McClung—case closed, and entry remains intact.—William A. Penny *vs.* Charles R. McClung.

United States Land Office.

PERRY, OKLA. TER., *October* 3, 1900.

I, Alfred H. Boles, register of the United States land office lolated at Perry, Oklahoma Territory, do hereby certify that the above and foregoing decision is a true and exact copy of the original decision in the case of Penny *vs.* McClung, now on file in my office. Being Secretary's decision on motion for review, and Commissioner's letter dated May 8, 1899.

ALFRED H. BOLES, *Register.*

Revenue stamp, 10 cts. 10, 3, 1900. A. H. B.

74 And thereupon the defendant rests her case and the plaintiff rests his case, and this was all the testimony offered.

TERRITORY OF OKLAHOMA, } *ss:*
Kay County, }

I, Eugene F. Blaise, official court reporter of the district court of the fourth judicial district, Territory of Oklahoma, hereby certify that as such court reporter I took the proceedings in case No. 1622, William Penny *v.* Ida McClung, and that the above and foregoing is a true and correct transcript of the notes taken by me of the testimony of witnesses, the objections of counsel, rulings of the court, and exceptions thereto, except Exhibits A, B, and C.

EUGENE F. BLAISE,
Court Reporter.

Thereupon, after hearing the evidence and the arguments of counsel, the court found the issue in said cause in favor of the plaintiff. And on the said 26th day of October, A. D. 1900, rendered judgment that the plaintiff have restitution of the premises described in his complaint, and for costs of suit.

Thereupon on the said 26th day of October, A. D. 1900, the defendant filed her motion for a new trial in said cause; which said motion was in the words and figures as follows, to wit:

75 In the District Court of Kay County, Oklahoma Territory.

WILLIAM A. PENNY
vs.
IDA MCCLUNG. } Motion for a New Trial.

Now comes the above-named defendant and moves the court to set aside the decision and findings of the court and grant a new trial in this cause for the following reasons, to wit:

(1.) For that the decision is not sustained by sufficient evidence and is contrary to law.

(2.) For error of law occurring at the trial and excepted to by the defendant.

J. L. PANCOAST AND
S. H. HARRIS,
Attorneys for Defendant.

That thereafter, on the said 26th day of October, A. D. 1900, the above and foregoing motion for a new trial came on to be heard before the court. And after hearing the parties and giving the matter due consideration, and the court being advised in the prem-ses, said motion for a new trial was overruled by the court. To which ruling of the court the defendant then and there duly excepted. A journal entry of said proceedings, orders, and judgments in said cause is in the words and figures as follows, to wit:

In the District Court of Kay County, Oklahoma Territory.

WILLIAM A. PENNY, Plaintiff,
vs.
IDA MCCLUNG, Defendant. } Journal Entry.

76 Now on this 26th day of October, A. D. 1900, the above and foregoing cause came on to be heard before the court, a jury having been waived therein, the plaintiff appearing in person and by his attorneys, C. W. Ransom, and J. F. King, and the defendant appearing in person and by her attorneys, J. L. Pancoast and S. H. Harris; and thereupon each of the said parties having submitted their evidence and the court being fully advised in the premises, the court finds the defendant guilty as charged in the complaint.

It is therefore ordered, and adjudged by the court that the plaintiff do have restitution of the premises described in his complaint, viz; the southwest quarter of section 30, in township 26, north of range 1 east, I. M. in Kay county, Oklahoma Territory, and the costs of this suit, to be taxed by the clerk of this court. To which judgment, and each and every part thereof, the defendant then and there excepted.

Thereupon on the said 26th day of October, A. D. 1900, the defendant Ida McClung, filed her motion for a new trial in said cause, and said motion coming on to be heard on said day, and after due consideration thereof said motion for a new trial is by the court over-

ruled. To which ruling of the court in overruling the said motion for a new trial, the defendant then and there duly excepted.

Thereupon upon the application of the said defendant, and for good cause shown, the defendant herein, Ida McClung, is granted ninety days from this date, the 26th day of October, A. D. 1900, within which to make and serve a case-made in said cause for the Supreme Court, and the said plaintiff, William A. Penny, is granted twenty days from the time said case-made is served, within which to suggest amendments to such case-made. And it is ordered that the said case-made, together with any amendments that may be suggested, shall be presented for settlement and certification upon five days' notice in writing, of the time and place where said case will be presented for settlement. And upon application of the said defendant, it is ordered that the judgment of restitution herein shall be stayed for a period of thirty days from this date, as to all of said land, except about forty acres in the southwest portion thereof, more particularly described as follows, to wit: Commencing at the
77 southwest corner of said quarter section, and running thence east 67 rods, thence north 100 rods, thence west 67 rods, and thence south 100 rods, to the place of beginning, except that portion within said boundaries occupied by the hog pens of the defendant; and if the said defendant, shall within such time file with the clerk of this court a supersedeas bond in the sum of $1000, conditioned as required by law, then and in that case the said judgment of restitution shall be stayed as to that portion of land above specified, for a period of twenty days after the said case-made shall be signed and settled, in order to enable the defendant to have sufficient time to file said case-made and his petition in error in the Supreme Court.

BAYARD T. HAINER, *Judge.*

O K.
RANSOM & BAILEY,
Att'y- for Plaintiff.

O K.
J. L. PANCOAST,
Att'y for Defendant.

Filed Apr. 15, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

The above and foregoing record contains all of the pleadings, motions, orders and the evidence in said cause.

We, the undersigned attorneys for the plaintiff in the above-entitled cause, do hereby acknowledge due service of the above and foregoing case-made for the Supreme Court, this 19th day of January, A. D. 1901

RANSOM & BAILEY,
Attorneys for Plaintiff.

Filed, Apr. 15, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

78 On this the 18 day of March 1901, we the undersigned attorneys for plaintiff in the above-entitled cause do hereby waive the five days' notice in writing of the time and place where the said case-made will be presented for settlement and certification, and agree that the same may be presented at Newkirk, O. T. for settlement on this day without further notice.

RANSOM & BAILEY,
Attorneys for Plaintiff.

Filed Apr. 15, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

TERRITORY OF OKLAHOMA, } ss:
Noble County, }

Be it remembered that on this 18 day of March, A. D. 1901, the above and foregoing case-made was submitted to the undersigned judge of the district court within and for the fourth judicial district of the Territory of Oklahoma for settlement and certification, the defendant appearing by his attorney, J. L. Pancoast, and the plaintiff appearing by his attorneys, Ransom & Bailey, and there being no suggestions of amendment, upon examination and determination I find that said record is a true and correct record of the trial and all the proceedings in said cause, and hereby sign, settle, and approve the same as and for a case-made for the Supreme Court, and I do hereby certify that said record contains all the pleadings, motions, demurrers, findings, evidence, judgment and proceedings had at the trial of said cause. And it is ordered that the said case-made be attested by the clerk of this court, and filed as a part of the records of said cause, and after being filed the same shall be returned to the defendant to be filed in the Supreme Court.

Witness my hand at Perry, in said county and Territory, the day and year last above written.

BAYARD T. HAINER,
Judge of the District Court.

Attest: JAY E. PICKARD,
Clerk District Court,
By E. A. BURKE, *Deputy.*

Filed Apr. 15, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

79 1085. Ida McClung *vs.* Wm. A. Penny. Petition in error and case-made. Filed in district court of Kay county, Oklahoma, this 18th day of March, 1901. Jay E. Pickard, clerk, by E. A. Burke, deputy. Filed, Apr. 15, 1901. Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

80 And thereafter at the June, 1901, term of said supreme court, on the third day of June, 1901, the following proceedings were had in said cause, to wit:

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } # 1085.

Ordered by the court that this cause be now submitted on briefs and stipulation.

81 And thereafter to wit, at the June, 1901, term of said supreme court, on the fourth day of June, 1901, the following proceedings were had in said cause, to wit:

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } # 1085.

Ordered by the court: That leave be and the same is granted to defendant to file briefs; and oral argument is waived.

82 And thereafter, to wit, at the June, 1902, term of said supreme court, on the fifth day of June, the following proceedings were had in said cause, to wit:

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } # 1085.

And now this cause comes on for final determination by the court upon the record, briefs and stipulations submitted herein.

And the court having examined the same, and being fully advised in the premises, finds: That the judgment of the lower court in this cause should be affirmed, at the cost of plaintiff in error.

It is now therefore hereby ordered and adjudged by the court: That the judgment of the lower court in this cause be and the same is hereby affirmed at the cost of plaintiff in error.

Opinion by Irwin, J., all the justices concurring, except Justice Hainer, who tried the cause below, and Justice Pancoast who was counsel in the cause below, not sitting.

83 Which said opinion reads in words and figures as follows, to wit:

84 In the Supreme Court of the Territory of Oklahoma, June Term, 1902.

Filed June 5, 1902.

IDA McCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } No. 1085.

Syllabus.

1. Where a complaint in forcible entry and detainer is filed, which is sufficient on its face, the fact that it contains the allegation that the plaintiff is the owner of the premises therein described, will be treated as descriptive of his right of possession, and not as raising the question of title. Inasmuch as the question of title cannot be raised or tried in an action of forcible entry and detainer, the filing of an answer setting up title, or claiming an equitable right to declare a resulting trust, will not divest the probate court of jurisdiction.
2. *Jurisdiction of probate courts in forcible entry and detainer*, by article 15, chapter 18, section 1562, Statutes of 1893, reads:—

"Probate courts in their respective counties shall in addition to the powers conferred upon them by the probate chapter of the Territory have and exercise all the ordinary powers and jurisdiction of justices of the peace."

By this provision, jurisdiction is given of the action of forcible entry and detainer, as forcible entry and detainer is one of the ordinary powers of justice of the peace.

Error from the district court of Kay county, Bayard T. Hainer, trial judge. Affirmed.

Pancoast and Bowles and S. H. Harris, for the plaintiff in error.
Ransom and Bailey and J. H. King, for the defendant in error.

Statement of Facts.

This is an action commenced by the defendant in error in the probate court of Kay county, Oklahoma Territory, and is an action of forcible entry and detainer to recover the possession of the S. W. ¼ of section 30, twp. 26, north of range 1 east. The facts are
85 that defendant in error and one Charles R. McClung, the husband of plaintiff in error, both claimed this tract of land as homestead settlers, and contested for their rights as such, through the several Departments of the Interior, to a final determination, which was in favor of defendant in error, who, having completed his entry, brought this action to obtain possession of the land. The defendant files a general denial, and also sets up by way of answer that the Land Department and the Secretary of the Interior misapplied the law in the case, and that the defendant in error was not a qualified entryman, and alleges that she, the plaintiff in error intends to bring an action to declare the title of defendant in error a trust for the benefit of plaintiff in error. Judgment in the probate

court was rendered in favor of defendant in error. An appeal was taken to the district court, and a similar judgment rendered there, and exception saved, and the cause is brought here for review.

Opinion of the court by IRWIN, *J.*:

While there are several assignments of error, only three are argued or insisted upon by plaintiff in error in his brief. First, it is alleged that as defendant in error in his complaint says that he is the owner of the premises therein described, this raises the question of title, and deprives the probate court of jurisdiction.

We do not think this position is well taken. The word owner as herein used would be merely descriptive of plaintiff's right of possession, and would not change the nature of the action. Second: It is denied that the probate court has jurisdiction in an action of forcible entry and detainer. By article 13, chapter 67, Revised Statute of 1893, justices of the peace within their respective counties are given jurisdiction in such actions.

Article 15, chapter 18, section 1562, of the same statute reads as follow-:

"Probate cou-ts in their respective counties, shall, in addition to the powers conferred upon them by the probate chapter of the Territory, have and exercise the ordinary powers and jurisdiction of justices of the peace."

And we think these two sections are a complete answer to this contention of plaintiff in error.

86 The sole and only remaining assignment of error is the third, that is, has the plaintiff below the right to bring and ma-ntain forcible entry and detainer, upon the strength of a homestead entry, when the defendant claims an interest in the land, other than possession? That is, where the defendant below claims the right to bring an action to declare plaintiff's title to be in trust for defendant. This court in the case of McLaughlin *vs.* Fariss, reported in the 7th Oklahoma, page 6, say:

"Where a homestead entryman has complied with all of the requirements of the Federal statutes, applicable to the disposal of the tract of land occupied by him, and has made final proof, paid the amount of money required, and received final certificate therefor, he has a complete equitable title to said land."

In case of Kansas Pacific Railway Company *vs.* McBratney, 12 Kans. 17, Justice Brewer, speaking for the court, says:

"In an action for the recovery of real property, it shall be sufficient if the plaintiff state in his petition that he has a legal or equitable estate therein, and is entitled to the possession."

In a case very similar to the case at bar, the case of Laughlin *vs.* Fariss, above cited, which was one where the contest had been finally decided by the Department of the Interior, in favor of the plaintiff, and he had completed his entry, and the defendant sought to hold possession by virtue of a second contest, this court held that forcible detainer was the proper action. The only remaining question is, Can the question of a resulting trust be set up as a defense and tried in this action? Such an answer sets up title in the defend-

ant, and in fact asks the trial court to reverse the decision of the Department of the Interior, and declare the title and ownership to be in the defendant. The right to adjudicate such equitable rights in an action of this kind has been denied by this court, in the case of McDonald *vs.* Stiles, 7th Oklahoma, page 328, which was an action begun as unlawful entry and forcible detainer, before a justice of the peace. The defendant in the justice court filed answer, denying the allegation of unlawful entry, and of plaintiff's right to possession, and also set up equitable title in himself, and that the plaintiff held the real estate in question in trust for him, thus making it in
87 principle a case precisely like the one at bar. And in that case this court, through its chief justice, uses the following language:

"We are satisfied that it was never the intention of the legislature that any question other than that of the right to possession should be tried in this class of cases. It was the purpose to provide a speedy and inexpensive mode of restoring possession of real estate to the one rightfully entitled to the same. By putting title in issue, and certifying the case to the district court, all the purposes and ends to be attained by this form of remedy, and the evils to be corrected, are defeated, and the action becomes one to try legal and equitable titles, and delays the determination of possessory rights. Upon neither sound reason nor principle can the practice be sustained of converting a possessory action into one of ejectment, or one in equity to declare a resulting trust and decree conveyances of legal titles. There are appropriate forms of action, and proper forms provided for the trial of all this class of cases, and the ends of justice will be much better subserved if the remedy intended to be provided for the unlawful withholding of possession of real estate is confined to the purposes for which it was originally designed."

This court in the case of Kirtley *vs.* Dykes, 10 Okla., 18 says:

* * * "When the matter was finally decided by the Land Department, and a judgment rendered in favor of the plaintiff. Her right to the possession of the premises was completed." Armour Packing Co., *vs.* Howe, 64, Pac. 43; Widman *vs.* Taylor, 65 Pac. 615.

The entire theory of this action is that it is purely possessory. That it deals with the possessory rights and not the ultimate rights of the parties. Questions other than the immediate rights of the parties cannot be litigated in such action. If the party desires to have an adjudication of her right to a resulting trust in the land, she must resort to another forum, and another form of action.

Having examined the entire record, and finding no error therein, and believing that substantial justice has been done, the decision of the district court is affirmed, at the cost of the plaintiff in error, all the justices concurring, except Justice Hainer, who having presided in the court below, took no part in this action, and Justice Pancoast being counsel in the court below, not sitting.

88 And thereafter, to wit: June 19, 1902, at said June, 1902, term, plaintiff in error presented her petition for writ of error,

together with assignments of error, which said petition and assignment read in words and figures as follows, to wit:

89 *Assignment of Error in the Supreme Court of the United States.*

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error.

Of December term, in the year of our Lord nineteen hundred and two.

Afterwards, to wit, on the first Monday in December in this same term before the justice- of the Supreme Court of the United States at the Capital in the city of Washington, comes the said Ida McClung by John W. Shartel and S. H. Harris, her attorneys, and say that in the record and proceedings in the cause aforesaid there is manifest error in this to wit:

First. That the supreme court of the Territory of Oklahoma erred as a matter of law in holding and deciding that the probate judge for Kay county, Oklahoma Territory, had jurisdiction to entertain and try the said action as an action of forcible entry and detainer as begun in said court.

Second. That the said supreme court of the Territory of Oklahoma erred in holding and deciding that the title and ownership of land was not involved or drawn in question in said cause by the pleadings and evidence therein.

Third. That the said supreme court of the Territory of Oklahoma erred in holding and deciding that the allegations of title in the bill of particulars of the plaintiff in the said forcible entry and detainer action were but an incident to the right of possession when such allegations were denied and put in issue by the answer of the defendant.

90 Fourth. That said supreme court erred in rendering judgment for the defendant in error and affirming the judgment of the trial court instead of rendering judgment for plaintiff in error and reversing the judgment of the said trial court.

Fifth. That the said supreme court erred in ignoring and refusing and neglecting to pass upon and determine the question as to the validity as well as the force and effect of the homestead entry relied upon by defendant in error in the trial of said cause.

Sixth. That the said supreme court of the Territory of Oklahoma erred in not holding and deciding that the defendant in error was disqualified to enter and acquire title to the land in question by reason of the fact that he had entered upon the lands embraced within the Cherokee Outlet in violation of the act of Congress and proclamation of the President opening the same to settlement.

Seventh. That the said supreme court erred in not holding and deciding that the said homestead entry could be considered valid and of any force and effect for the purposes only of complying with the laws of the United States and acquiring title to said land, and tha

when said entry was relied upon as a basis of a right to oust plaintiff in error of possession which she had acquired pursuant to the laws of the United States and by reason of a compliance therewith that the court was then required to investigate and inquire into the violation as well as to the force and effect of said homestead entry for the purpose for which it was sought to be used in said cause.

Eight-. That the said supreme court erred in not holding and deciding that plaintiff in error had a right by reason of her compliance with the laws of the United States to remain in the possession of said land for the purpose of protecting her rights, until
91 patent had issued and an action could be commenced for the purpose of acquiring the legal title to said land.

Ninth. That the judgment of the said supreme court of the Territory of Oklahoma was given for the defendant in error when it should have been given for the plaintiff in error.

Tenth. That the value of the land and the matter in controversy in said action exceeds five thousand dollars ($5,000.00) as appears by affidavits presented in the record of said cause.

Wherefore, the plaintiff in error prays that the judgment aforesaid may be reversed, annulled and altogether held for nothing and that she may be restored to all things which she has lost by occasion of said judgment and that the errors of the said supreme court of the Territory of Oklahoma be fully corrected.

JOHN W. SHARTEL AND
S. H. HARRIS,
Attorneys for Plaintiff in Error.

Filed Jun- 19 1902

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

92 And on the same day, to wit, June 19, 1902, said plaintiff in error submits with her application for writ of error and assignments of error, affidavits as to the amount involved in this controversy, which affidavits read in words and figures as follows, to wit:

93 In the Supreme Court of the United States.

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } Affidavit.

UNITED STATES OF AMERICA,
Territory of Oklahoma, County of Logan, } *ss:*

S. H. Harris being first duly sworn says that he is acquainted with the premises involved in the above action and that he knows of the controversy between the parties therein; that said action involves the possession and ownership of the lands in said cause described, and that the matter in controversy between the parties in

said action, exclusive of costs, exceeds the sum of $6,000.00; that said value consists of the right of possession and power to relinquish to the Government of the United States the homestead entry upon said land and the said relinquishment can and would be readily sold for the sum of $6,000.00 or more if the plaintiff in error should be removed from said premises.

S. H. HARRIS.

Subscribed and sworn to before me this 19th day of June A. D. 1902.

BENJ. F. HEGLER,
Clerk of the Supreme Court,
[SEAL.] By JESSIE PARDOE, *Deputy.*

Filed: June 19, 1902.
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

94 In the Supreme Court of the Territory of Oklahoma.

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } Affidavit.

UNITED STATES OF AMERICA,
Territory of Oklahoma, } *ss:*

B. O. Finley, being first duly sworn, says, that he is acquainted with the premises involved in the above action, being the southwest quarter of section thirty, township twenty-six, north, range one, east, I. M. in Kay county, Oklahoma Territory, and with the nature of the controversy involved in said suit.

That he is familiar with the value of lands in the vicinity of the land in question, as well as the said described tract; that the relinquishment of the defendant in error, William A. Penny, to said land in case the plaintiff in error could be removed therefrom, would be worth, and could readily be sold for the sum of eight thousand dollars, or more; that the amount in controversy between the parties in said action, exclusive of costs, exceeds $5,000.

B. O. FINLEY.

Subscribed and sworn to before me this 23 day of June, 1902.

E. J. DICK,
Notary Public.

My commission expires Feb'y 20", 1906.

[SEAL.]

Endorsed: 1085, McClung *vs.* Penny—Affidavit—Filed July 2, 1902. Benj. F. Hegler, clerk supreme court. By Jessie Pardoe, deputy.

95 In the Supreme Court of the Territory of Oklahoma.

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } Affidavit.

UNITED STATES OF AMERICA,
Territory of Oklahoma, } ss:

R. L. Winebrenner, being first duly sworn, says, that he is acquainted with the premises involved in the above action, being the southwest quarter of section thirty, township twenty-six, north, range one, east, I. M. in Kay county, Oklahoma Territory, and with the nature of the controversy involved in said suit.

That he is familiar with the value of lands in the vicinity of the land in question, as well as the said described tract; that the relinquishment of the defendant in error, William A. Penny, to said land in case the plaintiff in error could be removed therefrom, would be worth, and could readily be sold for the sum of eight thousand five hundred dollars, or more; that the amount in controversy between the parties in said action, exclusive of costs, exceeds $5,000.

R. L. WINEBRENNER.

Subscribed and sworn to before me this 24 day of June, 1902.

E. J. DICK,
Notary Public.

My commission expires Feb'y 20", 1906.

[SEAL.]

Endorsed: 1085—McClung vs. Penny—Affidavit—Filed July 2, 1902. Benj. F. Hegler, clerk supreme court. By Jessie Pardoe, deputy.

96 In the Supreme Court of the Territory of Oklahoma.

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } Affidavit.

UNITED STATES OF AMERICA,
Territory of Oklahoma, } ss:

P. P. Bridges, being first duly sworn, says, that he is acquainted with the premises involved in the above action, being the southweat quarter of section thirty, township twenty-six, north, range one, east, I. M. in Kay county, Oklahoma Territory, and with the nature of the controversy involved in said suit.

That he is familiar with the value of lands in the vicinity of the land in question, as well as the said described tract; that the relinquishment of the defendant in error, William A. Penny, to said land in case the plaintiff in error could be removed therefrom, would be worth, and could readily be sold for the sum of eight thousand

dollars or more; that the amount in controversy between the parties in said action, exclusive of costs, exceeds $5 000.

P. P. BRIDGES.

Subscribed and sworn to before me this 25 day of June, 1902.

E. J. DICK.

My commission expires Feb'y 20" 1906.

[SEAL.]

Endorsed: 1085—McClung *vs.* Penny—Affidavit—Filed July 2, 1902. Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

97 And on the same day, to wit, June 19, 1902, an order allowing said writ of error was made, a copy of which reads in words and figures as follows, to wit:

98 In the Supreme Court of the Territory of Oklahoma.

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } Order.

Now, upon this 19th day of June A. D. 1902, comes the plaintiff in error by her attorneys, S. H. Harris and John W. Shartel, and files herein, and presents to the court, her petition and assignment of errors, praying for an allowance of a writ of error, and that a transcript of the record and proceedings duly authenticated may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises. Upon proper consideration whereof, the plaintiff does allow the writ of error, and directs and commands the clerk of this court to transmit to the said Supreme Court of the United States, a true, correct and certified transcript of the record and proceedings herein.

It is further ordered, that the plaintiff in error shall give bond for the payment of all costs that may accrue in said proceedings in the sum of three hundred ($300.00) dollars, or in lieu of such bond, shall deposit with the clerk of the United States Supreme Court, such sum as may be required by said clerk as security for all costs that may accrue in said action, and shall pay all costs in this court, subject to the final order of the court taxing costs herein.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of Oklahoma Territory.

Attest: BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court, O. T.*

Filed: June 19, 1902.

BENJ. F. HEGLER,
Clerk Supreme Court.

99 And on the same day, to wit, June 19, 1902, a writ of error was issued in this cause, which reads in words and figures as follows, to wit:

100 In the Supreme Court of the United States of America.

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error.
} Writ of Error to the Supreme Court of the Territory of Oklahoma.

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable supreme court of the Territory of Oklahoma, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said court before you in which the value of the land and the matter in controversy exceeds five thousand dollars ($5,000.00) and wherein it appears that the value of the land is involved in the right of possession brought in question in said cause, a manifest error hath happened to the great damage of the said Ida McClung as by her complaint and assignment of errors appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States with this writ, so that you have the same at Washington on the eighteenth day of July, next, in the said Supreme Court to be then and there held that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States and of said Territory should be done.

It is further ordered and commanded that mandate and execution upon the said judgment of the supreme court of the Territory of Oklahoma be stayed until the final determination of this
101 cause on condition that the said plaintiff in error enter into a good and sufficient undertaking to the defendant in error in the sum of twelve hundred dollars conditioned as required by law, within twenty days.

Witness, the Honorable John H. Burford, chief justice of the supreme court of the Territory of Oklahoma, this eighteenth day of June, in the year of our Lord nineteen hundred and two.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

Allowed by
JNO. H. BURFORD,
Chief Justice of the Supreme Court of Oklahoma Territory.

Filed Jul- 16 1902

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

102 And afterward to wit, July 2, 1902, plaintiff in error filed her bond in this cause, which copy of said bond reads in words and figures as follows, to wit:

103 In the Supreme Court of the Territory of Oklahoma.

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } Bond on Appeal.

Know all men by these presents, that we, Ida McClung, (now Ida Bridges), as principal, and B. O. Finley, R. L. Winebrenner and P. P. Bridges, as sureties, are held and firmly bound unto William A. Penny in the full and just sum of twelve hundred ($1200) dollars to be paid to the said William A. Penny his certain attorney, administrator, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 20th day of June, A. D. 1902.

Whereas, lately, at a term of the supreme court of the Territory of Oklahoma, in a suit pending in said court, wherein Ida McClung is plaintiff in error, and William A. Penny is defendant, in error, judgment was rendered in said court on the 5th day of June, A. D. 1902 in favor of said defendant in error, and against the said plaintiff in error, and the said plaintiff in error having obtained a writ of error from the Supreme Court of the United States for the reversal of said judgment, and an order of the said supreme court of the Territory of Oklahoma staying the mandate, and execution of said judgment upon the giving by plaintiff in error, of a good and sufficient bond in the said sum of twelve hundred ($1200) dollars, and citation having been issued upon the said writ of error, and served upon Charles W. Ransom, attorney for defendant in error, citing and admonishing the said defendant in error, to be, and appear, at a Supreme Court of the United States to be holden at Washington the first Monday of December next.

Now, the condition of the above obligation is such, that if the said Ida McClung, (now Ida Bridges), shall prosecute her said writ of error to effect, and answer all damages and costs if she fail
104 to make her plea good, then the obligation to be void; else to remain in full force and virtue.

Witness our hands this 20th day of June, A. D. 1902.

IDA McCLUNG (NOW BRIDGES).
B. O. FINLEY.
R. L. WINEBRENNER.
P. P. BRIDGES.

Approved the within bond and the sureties thereto this July 7, 1902.

[SEAL.]

BENJ. F. HEGLER,
Clerk Supreme Court, O. T.

105 UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

B. O. Finley being sworn deposes and says: that he is worth the said sum of five hundred dollars, over and above all just debts, liabilities, and exemptions.

B. O. FINLEY.

Subscribed and sworn to before me this 23rd day of June, 1902.
[SEAL.] E. J. DICK,
Notary Public.

My commission expires on the 20th day of Feb'y, 1906.

UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

R. L. Winebrenner, being duly sworn, deposes and says: that he is worth the said sum of five hundred dollars, over and above all just debts, liabilities, and exemptions.

R. L. WINEBRENNER.

Subscribed and sworn to before me this 24th day of June, 1902.
[SEAL.] E. J. DICK,
Notary Public.

My commission expires on the 20 day of Feb'y, 1906.

UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

P. P. Bridge, being first duly sworn, deposes and says that he is worth the said sum of one thousand dollars, over and above all just debts, liabilities and exemptions.

P. P. BRIDGES.

Subscribed and sworn to before me this 25 day of June, 1902.
[SEAL.] E. J. DICK,
Notary Public.

My commission expires on the 20 day of Feb'y, 1906.

Endorsed: 1085—McClung *v.* Penny—Appeal bond—Filed July 2, 1902. Benj. F. Hegler, cl'k sup. ct.

106 UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

I, Benjamin F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the foregoing 105 pages numbered from one to 105 consecutively contain a full, true and complete copy of all the papers, records and proceedings in the above-entitled cause filed in the supreme court of the Territory of Oklahoma as the same remain on file and of record in my office,

and that the same includes the original assignment of errors, the writ of error, the citation and proof of service thereof.

In witness whereof, I hereunto set my hand and affix the seal of said court at Guthrie, this 7th day of July, A. D. 1902.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk Supreme Court, Oklahoma Territory.

107 [Endorsed:] Ida McClung, (now Bridges) appellant, *vs.* William A. Penny, appellee. Appeal from Oklahoma Territory.

Endorsed on cover: File No. 18,612. Oklahoma Territory, supreme court. Term No. 384. Ida McClung, plaintiff in error, *vs.* William A. Penny. Filed July 21st, 1902.